Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ISAAC RUSS and VERA LOVE,

Petitioners

v.

VAN B. WATTS, PHILLIP BANAZKIEWICZ, and ROBERT HELSON,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the parent-child relationship remains constitutionally protected under 42 U.S.C. § 1983 if the child is not a minor.

2. Whether a parent is prohibited from seeking recovery under 42 U.S.C. § 1983 for the death of a child if the defendant whose misconduct caused the death did not directly intend to terminate the parent-child relationship.

PARTIES TO THE PROCEEDING AND STATEMENT UNDER RULE 29.6

Pursuant to Rule 14.1(b) of the Rules of this Court, petitioners state that the names of all parties to this proceeding appear in the caption of the petition. Pursuant to Rule 29.6 of the Rules of this Court, no public or private corporate entity is a party to this proceeding.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Isaac Russ and Vera Love, pray that a writ of certiorari issue to review the judgment of the U.S. Court of Appeals for the Seventh Circuit entered in this case.

OPINIONS BELOW

The opinions of the district court (App., *infra*, 19A and 31A) are not reported in the Federal Supplement. These opinions are reported in Westlaw at 2004 WL 1459262 and 2004 WL 2065028. The opinion of the United States Court of Appeals for the Seventh Circuit (App., *infra*, 1A) is reported at 414 F.3d 783 (7th Cir. 2005).

JURISDICTION

The judgment of the court of appeals was entered on July 11, 2005 (App., *infra*, 1A). A timely petition for rehearing or rehearing *en banc* was filed which petition was denied on August 8, 2005 (App., *infra*, 17A). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the construction of the Fourteenth Amendment to the U.S. Constitution and the civil rights statute 42 U.S.C.A. § 1983, which are reproduced at App., 41A *infra*.

STATEMENT OF THE CASE

On June 5, 1999, just a few weeks before his graduation, Robert Russ was driving from the Northwestern University campus in Evanston, Illinois to his mother's home in Calumet City, Illinois. Russ was stopped by three police officers when he did not pull over for a traffic violation. The three police officers exited their vehicles with weapons drawn and surrounded Russ's car. Officer Watts positioned himself on the driver's side of Russ's vehicle while the two other officers stood on the passenger's side. Watts broke the rear window on the driver's side of the car and shot and killed Russ. (App. 2A-3A).

The petitioners, Isaac Russ and Vera Love, brought this action in the U.S. district court under 28 U.S.C. §1983 alleging that their son was shot and killed in violation of their constitutional Due Process right to the parent-child relationship with their son, which right is a protected liberty interest under the Fourteenth Amendment. (App. 4A).

After discovery was closed the parties made cross-motions for summary judgment. The district court granted the defendants' motions for summary judgment, finding that Robert Russ's parents lacked standing to bring the action because Robert Russ had become part of another family unit. (App. 26A).

At the time of his death, Robert Russ was unmarried and had no children. Several months before he was killed, Russ had conceived a child with Erin Lewis, who gave birth to Russ's son over four months after his death. Russ's paternity was confirmed through DNA testing after the child's birth. (App.

4A).

On behalf of Robert Russ's estate Lewis brought a wrongful death action in state court against Officer Watts and the City of Chicago, which resulted in a jury verdict in favor of the estate and against Watts and the City of Chicago. Neither Banazkiewicz nor Helson were parties to that case. (App. 4A, 21A).

The district court concluded that Robert Russ had become part of another family unit because Erin Lewis gave birth to his child, he did not live at home, but rather lived on campus at Northwestern University, and Lewis testified that she and Russ had discussed moving in together. (App. 25A-26A).

Petitioners submitted testimony that Russ had sexual relations with Lewis only once, that Russ was not sure that Lewis was carrying his child, and that Russ never indicated that he was going to move in with, or marry, Erin Lewis. (App. 25A-26A). After granting summary judgment to the defendants the district court denied the petitioners' motion to alter or vacate its judgment and the petitioners appealed.. (App. 31A). The U.S. Court of Appeals for the Seventh Circuit affirmed the district court's judgment on July 11, 2005. (App. 1A). The Court of Appeals did not consider the grounds on which the district court granted summary judgment, i.e., that Robert Russ had become a member of another family unit. (App. 16A).

The Seventh Circuit Court of Appeals affirmed the district court judgment by overruling its own circuit precedent. The Court of Appeals had held, since 1984, that a parent has a

constitutional Due Process liberty interest in the society of an adult child.. *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir.1984). In *Bell*, the Seventh Circuit established that a parent had a cognizable constitutional claim under §1983 for damages resulting from the death of the plaintiff's adult son. Id.

The court in this case overruled its own precedent, finding that a parent does not have constitutional right to recover for the loss of the companionship of an adult child when that relationship is terminated as an incidental result of state action. (App. 16A).

REASONS FOR GRANTING THE PETITION

The constitutional issue in this case lies at the core of the fundamental rights protected under the Fourteenth Amendment. Namely, the sanctity of the relationship between parent and child. This Court has long recognized that the liberty interest of a parent in her relationship with her child is perhaps the oldest of the fundamental rights under the Fourteenth Amendment's Due Process Clause. The observation by this Court that the Fourteenth Amendment "provides heightened protection against government interference with certain fundamental rights and liberty interests" applies with particular force to this relationship because of the primacy it holds in the constitutional hierarchy of fundamental rights. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

Given the importance of the right involved, this case presents two questions that can only be answered by this court: First, does a parent's right to recover damages under 42 U.S.C. §1983 for the death of a child decrease as the child enters

adulthood? If the answer to that question is 'yes", then at what point, if any, is the parent's right extinguished?

These two questions are matters of federal law because they flow from the Fourteenth Amendment of the U.S. Constitution and find their remedy under §1983. Although the issue in this case is one of federal constitutional law, the impact of this court's decision will not be limited to the cases found in our federal courthouses, but will spill over into the courts of the fifty states. This is so because our state and federal courts have concurrent jurisdiction to hear these kind of §1983 actions.

The Seventh Circuit's holding in *Russ v. Watts* is a reversal of its own precedent and in conflict with this court and those of the other circuits. The circuits are not just divided into two opposing camps on this question, but into a number of different factions. There is such a divergence of opinion in the reasoning, the constitutional rights in question and the outcomes among the circuits that each succeeding case engenders more conflict than uniformity. Today, a court of appeals that decides a case involving these issues can hardly articulate a rationale that does not force this important question into a deeper and more impenetrable legal thicket.

Five different circuit courts have noted that the Supreme Court has yet to intervene despite the uncertainty and widening conflict among the circuits. (First, Third, Fourth, Seventh and D.C. Circuit Courts of Appeals. *(Valdivieso Ortiz v. Burgos*, 807 F.2d 6 (1986); *McCurdy v. Dodd*, 352 F.3d 820 (3rd Cir. 2003); *Shaw v. Stroud*, 13 F.3d 791 (4th Cir. 1994); *Russ v. Watts*, 414 F.3d 783 (7th Cir. 2005); *Butera v. District of Columbia*, 235 F.3d 637 (D.C. Cir. 2001)).

I. THE CONFLICTS AMONG THE COURTS OF APPEALS ARE SO PERVASIVE THAT ONLY SUPREME COURT INTERVENTION CAN RESTORE ORDER

Nine circuits have considered this question in the past 30 years. Drawing on Supreme Court precedent, eight have recognized the existence of a constitutional right to the parent-child relationship. But that is where agreement ends and the conflicts start.

Twice before the U.S. Supreme Court has granted writs of certiorari to decide whether the Due Process Clause protects a parent's interest in the companionship with her child. These cases came before this court from a state supreme court. On the two occasions the U.S. Supreme Court granted writs of certiorari, it later dismissed them, one as being improvidently granted and the second due to a lack of jurisdiction. *Jones v. Hildebrant*, 550 P.2d 339 (Colo. 1976), *cert. dismissed* 432 U.S. 183 (1977); *Espinoza v. O'Dell*, 633 P.2d 455 (Colo. 1981), *cert. dismissed*, 456 U.S. 430 (1982). The conflict which started in a state supreme court quickly spread to the federal circuit courts of appeals and is continuing. Whether by happenstance or design, the divisions have festered after these two opportunities for review slipped away.

This area of the law is badly in need of this Court's guidance. The Seventh Circuit's reversal of itself and the equivocal nature of its decision adds more conflict and broadens the uncertainty in this area. Until this Court provides a definitive answer to this issue the lower federal courts are left with a jumbled assortment of holdings and no articulable standard to apply.

The Seventh Circuit Court of Appeals found this barrier to be impassable, as its opinion discloses. The court, in *Russ*, expressly declined to identify a coherent standard, electing instead to reverse itself by explaining what is not a constitutional right. It may have avoided, for the moment, becoming further entangled in the snarl of conflicts by stating that it did not need to define the applicable Due Process standard in this case. But this is a stopgap measure that fixes little and will not last long.

The existing, widespread intercircuit conflict is a recurring problem that will not go away. The Seventh Circuit's solution in this case was to whittle away at this constitutional liberty interest while taking pains not to cause it to fall altogether. In light of the prevailing conflict among the circuits, half measures and *ad hoc* decisions will be the rule. Given the volume of these kind of §1983 actions in the 12 federal judicial circuits and the 50 states, it is vitally important that the standards which govern cases such as this be clearly established and uniformly applied. Review of the decision below is warranted for a number of independent reasons.

II. THE DECISION BELOW IS CONTRARY TO THE SUBSTANTIVE DUE PROCESS HOLDINGS ESTABLISHED BY THIS COURT

In this case, the Court of Appeals for the Seventh Circuit overturned its decision in *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir.1984) after 20 years of faithful adherence to its holding, remarking *"Bell* was wrongly decided." (App. 11A). The Seventh Circuit justified reversing its own holding by relying upon Supreme Court authority, which authority does not support, but conflicts, with the Seventh Circuit's decision.

In an effort to support its holding, the lower court selected from among the numerous conflicting decisions of the circuit courts. Predictably, the result was to drive the wedge between the circuits deeper.

Despite its confession that *Bell* was wrongly decided, the court did its best to evade the intercircuit conflict and hedge its bets, announcing that it was not imposing an 'absolute rule' that parents do not have a liberty interest in their relationship with their children if the child is an adult. (App. 16A). The Seventh Circuit's wariness, coupled with its concession that considerable confusion exists on this question, is an implicit recognition that there are more complications already on the horizon.

In an ironical twist, one court that the Seventh Circuit relied upon as authority for its decision would decide the issue of adulthood in *Russ* differently than did the Seventh Circuit because it found that the right continues to exist until the child is an adult and independent. *Butera v. District of Columbia*, 235 F.3d 637, (D.C. Cir. 2001).

This inconsistency between circuits, which are in supposed agreement on this issue, highlights the hopelessness of these courts straightening out this dispute without help from above.

The Seventh Circuit purportedly found support in the Due Process holdings of the Supreme Court in reaching its finding that a parent has no cognizable constitutional right when the government causes the death of her son. (App. 12A-13A). (Citing *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) and *County of Sacramento v. Lewis*, 523 U.S. 833 (1998)).

The court of appeals cited these holdings for two propositions. First, in substantive Due Process cases a careful description of the asserted fundamental liberty interest is necessary in order to determine if it is one of the fundamental rights and liberties which are deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty. (Citing *Glucksberg*, at 721)(App. 13A). Second, given that the Due Process Clause was "intended to prevent government officials from abusing their power, or employing it as an instrument of oppression," the appropriate test to determine whether an executive officer has abused his power is whether it "shocks the conscience." (Citing *Lewis*, at 846-47)(App. 13A).

That this right exists, there is no doubt, as the Seventh Circuit acknowledged. (App. 12A). But the court was uncertain what the applicable standard was:

> "Although it is well established that parents have a fundamental constitutional liberty interest in the "care, custody, and control of their children," *Troxel v. Granville*, 530 U.S. 57, 65 (2000), the appropriate framework for analyzing claims alleging a violation of this interest is less than clear." (App. 12A).

The court of appeals is correct that under Supreme Court holdings the settled law recognizes a parent's protected liberty interest. No principle is more firmly established this. The problem with the opinion of the court of appeals is that these holdings do not support the court's decision and only increase confusion in this area. The Seventh Circuit's evaluation of these cases demonstrates that these authorities are not controlling on the questions in this case and still leave the

courts groping in the dark:

> "The interrelationship between *Glucksberg* and *Lewis* has been a source of considerable confusion. *See Galdikas*, 342 F.3d at 690 n.3. Further complicating matters, in *Troxel*, a plurality of the Court used a "combination of factors" test to hold that a state's visitation statute, as applied, unconstitutionally infringed on parents' fundamental right to rear their children. 530 U.S. at 72-73; *Heck*, 327 F.3d at 519." (App. 13A).

But by no conceivable interpretation do these holdings lead to the Seventh Circuit's conclusion that a parent's liberty interest in her relationship with her child vanishes if the official actions are not directed at the relationship. This court has said nothing of the sort, emphasizing that "the Fourteenth Amendment 'forbids the government to infringe... 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.' *Glucksberg*, at 721. (original emphasis)(citations omitted).

The Seventh Circuit's reasoning that no constitutional violation could ever arise from the death of a parent's child if the official actions were not directed at the parent's relationship with the child is contradicted by two of the Supreme Court holdings upon which the Seventh Circuit relies.

In *Glucksberg* , the court approved the constitutionality of a statute that prohibited assisted suicide. In that case, the court compared the state's interest in preserving life with the

individual's right to assisted suicide. The court conceded that many rights protected by the Due Process Clause sound in personal autonomy, but the general right of an individual to make intimate decisions does not lead to the sweeping conclusion that an individual has a fundamental right to assisted suicide. Id. at 728. This case is inapposite, as the analysis required a balancing of individual and state interests, which interests are not implicated in our case.

Neither does the holding in *Lewis* lend support to the Seventh Circuit's reasoning. The question in *Lewis* was whether a high speed police chase that resulted in the death of a passenger was violative of the decedent's Due Process rights. This court found that the decedent did not have a Due Process right because the officer's conduct involved reckless driving and was not accompanied by an intent to harm suspects physically or to worsen their legal plight. Id. at 854. The test followed in *Lewis* acknowledged the significant contrast between conduct which is reckless and conduct which is committed with an intent to harm the decedent. The distinction drawn in *Lewis* is irrelevant in the *Russ* case, since the record established that the officer intentionally shot and killed the decedent. (App. 3A).

Not only was the Seventh Circuit's reliance upon these two holdings misplaced and contrary to the principles they espoused, but it abandoned this controlling Supreme Court precedent when the time arrived to reach its ultimate conclusion. The lower court abruptly shifted gears when it concluded that no constitutional violation could ever arise from the death of a parent's child, absent intent. The Seventh Circuit avoided a collision with these Supreme Court principles by turning to the holdings of the Third and First Circuits in

McCurdy v. Dodd, 352 F.3d 820 (3rd Cir. 2003) and *Valdivieso Ortiz*, 807 F.2d 6 (1st Cir. 1986). The primary problem with the court's reliance upon these two circuit holdings is that they are causes of the present intercircuit conflict.

The Seventh Circuit's citation of authority from other circuit courts to reverse itself does not resolve an intercircuit conflict when these holdings have been rejected by the other circuit courts. When nine circuits have taken antagonistic positions simply changing one's vote from one side to the other does not create consistency. Unlike a legislative body, where majority rules, changing sides here does nothing to settle these deep seated conflicts.

The circuit court's citation to *Troxel v. Granville*, 530 U.S. 57, 65 (2000) is even more perplexing since the Supreme Court in that case struck down a child visitation statute because it was unconstitutionally overboard. (App. 13A). In so doing, the Supreme Court found it unnecessary to "...decide the precise scope of the parental due process right in the visitation context." *Troxel*, at 58.

The 'combination of factors' which the Supreme Court considered, and to which the Seventh Circuit referred, involved visitation factors contained in the statute. These factors included statutory presumptions concerning the best interest of the child, the fitness of the parent and other custodial-specific facts. They did not, as the Seventh Circuit's opinion suggests, create new standards relative to constitutional Due Process. They related to child visitation and have no bearing on this case. Id.

In its opinion in *Russ*, the Seventh Circuit conducted a selective and inaccurate review of the law from other circuits and this court in reaching its decision to reverse itself. As we explain, the Seventh Circuit's survey of the law missed or minimized most of these critical decisions.

III. THE CONFLICTS AMONG THE NINE CIRCUIT COURTS OF APPEAL ARE RECURRING PROBLEMS THAT UNDERMINE FEDERAL CONSTITUTIONAL LAW AND WILL AFFECT FUTURE CONSTITUTIONAL DECISIONS UNDER §1983

Both sides in a conflict claim the other to be wrong. Considering this argument, Abraham Lincoln observed, "Both **may** be - but one **must** be - wrong." With as many as nine factions in this circuit conflict, at least one must be wrong, and all may be.

The conflict among the circuits in this area is well-established, as the Seventh Circuit admitted in *Russ*. In its holding, the Court of Appeals did not conceal the level of confusion that exists among the circuits, all of which have different ideas what the contours of this essential, unenumerated right are. The Seventh Circuit's confession that its previous decision was "wrongly decided" did not lead it to the right decision, but only increased the turbulence on the subject. (App. 2A).

The lower court's attempt to chart a course based upon the Supreme Court holdings in *Washington* and *Lewis* was doomed from the outset. No pronouncement from the Supreme

Court has remotely justified as dramatic a sea change as the Seventh Circuit's holding created. And the Seventh Circuit identified none. The circuit court's change of direction was the likely by-product of the intercircuit conflicts that have been germinating for the past 25 years.

The court's acknowledgment that the existing precedent of the Supreme Court creates more confusion than clarity says something about the disarray among the circuits on this constitutional issue. (App. 13A).

Although the Seventh Circuit found itself to be out of step with some of its sister circuits, the action it took did nothing in the way of reconciling this problem, only throwing it out of step with other circuits. The striking and irreconcilable divergence of opinion among the circuits stems in large part from the uncertainty over a number of constitutional considerations that underlie the applicable Due Process standard. This uncertainty was not resolved by the Seventh Circuit in *Russ*, only adding another discordant voice to the dispute. As it stands, uniformity of decisions among the circuit courts is now a non sequitur, as the circuits themselves all acknowledge.

Two years ago, the Third Circuit Court of Appeals surveyed the circuits on this issue and, in a noteworthy understatement, remarked that "the Courts of Appeals are divided on the issue of whether the Due Process Clause protects a parent's right to the companionship of his or her adult son." *McCurdy v. Dodd*, 352 F.3d 820, 828 (3rd Cir. 2003). This statement was not a revelation, but a matter of historical fact that stretches back 30 years.

This Due Process right was expressly recognized by the Eighth Circuit Court of Appeals in 1974 when it held that "...'parenthood is a substantial interest of surpassing value and protected from deprivation without due process of law -- a fundamental legal right." *Mattis v. Schnarr*, 502 F.2d 588, 595 (8th Cir. 1974). In that case, an 18 year old man was shot and killed by the police attempting to escape arrest. His father brought an action against the police under §1983. Id. at 590. The court of appeals concluded that the father of a the decedent had standing to bring an action in his own right under §1983 because he had been denied the fundamental right to raise his son. Id. at 595. The father's constitutional right had been invaded irrespective of the intent of the defendant. Id. Under *Mattis*, whether the death of the plaintiff's son was the result of direct or incidental misconduct had no bearing on the violation of the father's rights.

In *Morrison v. Jones*, 607 F.2d 1269 (9th Cir. 1979) *cert. denied*, 445 U.S. 962 (1980) the Ninth Circuit reached the same conclusion, finding the parent-child relationship to be constitutionally protected and that governmental interference with it gives rise to a §1983 action for damages. Id. at 1275. That case involved mental health officials transporting the mentally ill son of the plaintiff to Germany. Id.

The same court of appeals reaffirmed the existence of this fundamental right in *Kelson v. City of Springfield* 767 F.2d 651 (9th Cir. 1985), a case in which the plaintiffs' son committed suicide while being monitored by a municipal police officer and teacher. The parents sued under §1983. The court in *Kelson* concluded that parents possessed a constitutionally protected interest in the companionship and society of their children and that this liberty interest is cognizable under §1983.

Id., at 655. On remand, the district court was instructed to determine whether the parents could allege a claim under §1983 for the loss of companionship and society. This aspect of the court of appeals' ruling was significant because it explained the nature of state action necessary to establish a §1983 claim.

The court of appeals held that the plaintiffs' claim would be cognizable if they alleged that the action of the teacher and police officer was a product of state policy. If the conduct was predicated upon random, unauthorized acts then a §1983 would not stand. Both the Eighth and Ninth Circuit decisions were anchored to established Supreme Court and circuit precedent. The Ninth Circuit explained the source of its holding:

> "[E]xisting Supreme Court and Ninth Circuit precedent establish that a parent has a constitutionally protected liberty interest in the companionship and society of his or her child. The state's interference with that liberty interest without due process of law is remediable under §1983." at 655. (Citing *Morrison v. Jones*, 607 F.2d 1269 (9th Cir. 1979) *cert. denied*, 445 U.S. 962 (1980)).

What is notable about *Kelson* is that the defendants' state of mind was immaterial to the viability of the Due Process right of the parents. The Ninth Circuit found that a claim would be viable whether the disruption to the parent-child relationship was incidental or direct, a distinction which conflicts with the later holdings of the First, Third and D.C. circuits. At the same time that the Ninth Circuit decided *Kelson*, the Seventh and Tenth Circuits reached similar decisions in *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir.1984) and *Trujillo v. Board of County Comm'rs of Santa Fe County*, 768 F.2d 1186, 1189

(10th Cir. 1985).

In *Bell*, the Seventh Circuit analyzed the constitutional authorities and legislative history and underlying objective of §1983 in a detailed 75 page opinion. Id. at1205. Only after painstaking analysis did the court find that a parent's constitutional Due Process right to the society of his adult son was one of our unenumerated constitutional rights. Id. at 1244. The state of mind of the defendants was irrelevant. Equally important, the court in *Bell* found that the parent's constitutional Due Process right to the society of his son did not vanish because his son was an adult, noting that the decedent was single, had no children, and had not become a part of another family unit other than his father's, although the two lived apart. See *Bell*, 746 F.2d at 1245. The court concluded that the victim's age and separate residence were relevant only to the amount of damages to be awarded to the father for the loss of the son's society and companionship. Id.

This issue was a recurring one, and other circuits were being called upon to decide it. In *Trujillo*, the Tenth Circuit also found that a parental right to association with a child existed, but found that the right had its genesis in the First Amendment, characterizing it as the right to freedom of intimate association. Id. at 1190, n 7. The plaintiffs were the mother and sister of an inmate who died while in custody. Although the court recognized that both the mother and sister possessed a fundamental, constitutional right, it deviated from the analysis used by the Seventh, Eighth and Ninth circuits, adding the requirement that the decedent's family could not bring an action under §1983 unless the defendant's misconduct was aimed at the family members' right to associate with their son and brother. Id. This ingredient was new. The Tenth

Circuit realized that including this consideration in the analysis took the court into uncharted territory. The Tenth Circuit explained its decision to deviate from the mainstream and create a disagreement with its sister circuits because of its concern that an actionable right to intimate association might lead to §1983 actions based on theories of negligence:

> "We realize that other courts have not imposed any state of mind requirement to find a deprivation of intimate associational rights. *See e.g., Bell, 746 F.2d 1205; Mattis, 502 F.2d 588; Jones, 429 F. Supp. 848.* However, their rationale would permit a section 1983 claim by a parent whose child is negligently killed in an automobile accident with a state official, a result expressly disapproved in *Parratt,* 451 U.S. at 544." (citing *Parratt v. Taylor ,* 451 U.S. 527, 68 L. Ed. 2d 420, 101 S. Ct. 1908 (1981)). Id.

The motivating principle behind the *Trujillo* court's 'state-of-mind' requirement appears to be its desire to follow this court's holding in *Parratt* and avoid opening the floodgates to §1983 negligence actions. Id.

The opinion in *Trujillo,* however, implicitly accepted the proposition that misconduct which was aimed at the family relationship gives rise to an action under §1983 by all family members for the violation of their right to family association. In this respect, the holding in *Trujillo* expanded the scope of the Due Process right enunciated by the Seventh, Eighth and Ninth Circuits. The Seventh Circuit had limited the Due Process right to the parent-child relationship and declined to extend it to siblings. *Bell,* at 1248. The Eighth and Ninth Circuits recognized this Due Process protection but had not considered

the issue beyond the parent-child relationship. *Mattis*, at 595; *Kelson*, at 655.

As it stood, at least five circuit court decisions recognized the parent-child Due Process right, only one of which required proof of intent to disturb the relationship itself. The First Circuit then threw this area of law into greater disarray when it made the mistake of attempting to apply the parent-child Due Process standard to a stepfather and siblings. *Valdivieso Ortiz v. Burgos*, 807 F.2d 6 (1986). That case involved a §1983 action brought by the decedent's stepfather and siblings. It was unnecessary in that case for the court to consider the Due Process right of a parent because the case had nothing to do with parental companionship. The First Circuit conceded that the issue to be resolved was a narrow one, which involved an issue that it had not previously found to be actionable:

> "The narrow question before us is whether (the inmate's) stepfather and siblings have a constitutionally protected interest in the companionship of their adult son and brother deprivation of which is actionable under 42 U.S.C. §1983. Because we conclude that they do not, we affirm the judgment of the district court." at 6.

Once the court reached the obvious conclusion that a stepfather and siblings do not fall within the constitutionally protected parent-child relationship it should have stopped there. The plaintiffs were not the parents. Id. at 8. There was nothing more to it. The remainder of the court's opinion was nothing more than dicta, but dicta that led to more conflict. The First Circuit's gratuitous action was surprising because it recognized the conflict existing among the circuits, conceding that other

distinguished federal circuit courts had allowed §1983 actions for wrongful death resulting from an incidental, rather than direct, deprivation. Id. at 9, n 3, n 4. (citations omitted).

But, as the court in *Valdivieso Ortiz* noted, those cases involved a legal parent, who is the person with the strongest constitutional argument under such circumstances. As the plaintiffs in *Valdivieso Ortiz* were the stepfather and siblings, the law established in the other circuits would be inapplicable in any event. Id. at 9. The reasoning of the decision in *Valdivieso Ortiz*, however, shed no light on the boundaries of a parent's liberty interest in the companionship with his child. Repeating the plea of other courts, the First Circuit signaled the need for help, stating that:

> "[T]he Supreme Court has never considered whether family members have a liberty interest in the continued life of a relative." "In two cases in which the issue might have been addressed, the Court dismissed certiorari as improvidently granted. *See Jones v. Hildebrant*, 1291 Colo. 1, 550 P.2d 339 (Colo. 1976), *cert. dismissed* 432 U.S. 183, 97 S.Ct. 2283, 53 L.Ed.2d 209 (1977); *Espinoza v. O'Dell*, 633 P.2d 455 (Colo. 1981), *cert. dismissed* 456 U.S. 430, 102 S.Ct. 865, 72 L.Ed.2d 237(1982)."Id.

While the First Circuit was excluding stepparents and sibling from constitutional protection, the Ninth Circuit, in *Strandberg v. City of Helena*, 291 F.2d 744 (9th Cir. 1986) rejected the notion suggested in *Valdivieso Ortiz* that a 'state of mind' requirement existed in connection with this Due Process right. Reaffirming the Fourteenth Amendment right of parents to the companionship of an adult son, the court explained that

a parent's right consisted of two distinct components, first, the right to childrearing, and second, the right to companionship.

In *Strandberg*, the court noted that although the parents could not maintain an action for a constitutional *right to parent*, they still possessed a constitutional right to the companionship and society of their adult son. Id. at 748, n1. (emphasis added by court). The constituent elements of this Due Process liberty interest were more clearly defined, the right to companionship being one of these.

The following year, the same court found that the child, as well as the parent, has a constitutionally protected right to her relationship with her father. *Smith v City of Fontana,* 818 F.2d 1411 (9th Cir. 1987). (The plaintiff's father had been killed at the hands of the police in *Smith*). This holding confirmed the existence of a separate right of companionship, which right was distinct from the right of childrearing. Drawing from circuit and Supreme Court precedent, the court of appeals in *Smith* found that the child was entitled to the same right to the parent-child relationship as the parent. Notably, the Ninth Circuit did not require the plaintiff in either case to establish the defendant's 'state of mind' in order to state a claim under §1983. Id. at 417, n1.

A. The Recent Decisions in the Circuit Courts of Appeal Are in Such Disarray That Application of These Conflicting Standards to the Same Case Will Result in Different Outcomes in Other Circuits

The Court of Appeals for the District of Columbia moved in a different direction than its sister circuits in *Butera v. District of Columbia,* 235 F.3d 637 (D.C. Cir. 2001). The

court frankly acknowledged that the state of the law was such that there was no uniformity in the decisions of the circuit courts and that "The Supreme Court has not spoken to the precise issue." at 654. In that case the court found no actionable claim because the 31 year old child was an adult and independent. Id. at 656.

The holding and facts in *Butera* provide a good illustration of the effect that the discord among the nine circuits has on cases being decided now and in the future. Faced with holdings that point in a number of different directions, the circuits are now resolving cases on what is, in reality, an *ad hoc* basis.

In *Butera*, the plaintiff 's 31 year old son was murdered while working as an undercover informant for the police. She brought an action under §1983 in which she asserted a constitutionally protected liberty interest in the companionship of her son. The court of appeals in Butera, lacking guidance from the Supreme Court and unable to discern any uniform standard from the other circuit courts, decided the question on the narrow facts of the case. The court noted that the plaintiff's murdered son was 31 years old, had moved out of his mother's house when he was 18, was living in another state, provided no financial support to his mother, had married and had a child of his own. Id. at 656. These facts shaped the court's decision that the plaintiff had no parental due process interest if the child an adult **and** independent. Id. (emphasis added).

There was no underlying legal premise that the court identified to support its decision and its hesitant statement that the law from other circuits "suggests that no such right exists" was a sign of consternation rather than elucidation. Id. at 654.

The court in *Butera* made no reference to, nor found support in, any of the Supreme Court cases that the Seventh Circuit relied upon in *Russ* to conduct its substantive due process analysis.

Irrespective of the end result, these two cases are anomalous. It says nothing for the uniformity of circuit holdings when the Seventh Circuit in *Russ* finds the applicable Due Process standards in Supreme Court authority that the D.C. Circuit does not even find pertinent. As the three cases cited by the Seventh Circuit in *Russ* all pre-dated the decision in *Butera,* it is only logical that these two courts, reaching similar results, would find the appropriate legal standard in the same location. It is a mystery why the court in *Russ* used a standard that the *Butera* court said did not exist. *Butera,* at 654.

The court in Butera, as did the Seventh Circuit in this case, made it decision *ad hoc*, using the facts in the case to cut sections from the Due Process Clause. Both courts, unable to define the boundaries of the constitutional right, were forced into trying to explain what kind of parent-child relationships are not protected liberty interests.

A comparison of these two holdings demonstrates another fact about the degree of conflict that currently exists in this area. The holdings in *Butera* and *Russ* share more similarities than most cases from the other circuit courts. But, as we have explained, the fact that the Seventh and D.C. Circuits arrived at the same destination means nothing if the routes they took were from opposite directions.

The facts in *Russ* show that either, the Seventh Circuit or the D.C. Circuit is wrong. Or, both are. This conclusion is unavoidable, because if the rule prescribed in *Butera* is applied

to the facts in *Russ* it is clear that there would be a different outcome or, at the very least, a question for a trier of fact whether Robert Russ was an adult and independent.

Eric Butera was 31 years old, married, living out-of-state, the father of his own family and had been self sufficient since he was 18. Under the holding in *Butera*, adulthood was not sufficient in itself to negate the plaintiff's claim. The circuit court required that the child also be independent, but did not define that term other than by its description of the decedent's status. It appears the court meant financial independence, a much different matter than reaching adulthood. It is the rare case that a child becomes financially independent at the same time he becomes an adult. Most remain financially dependent upon their parents into adulthood, especially while in school. That difference between the D.C. Circuit and the Seventh Circuit would change the outcome on this issue in *Russ*.

At the time of his death Robert Russ was a student getting ready to graduate, unmarried, had no children and no job. He was not independent nor self sufficient. (App. 1A, 3A, 20A). The Seventh Circuit did not consider this factor, although it cited *Butera* as authority for this proposition. If it had considered this factor it would have decided that question differently, or at least submitted it to a trier of fact.

The importance of the comparison between these two holdings is not individual facts of the case, but that the holdings are based on *ad hoc* determinations, which do not identify any workable standard. Therefore, each successive decision will lead to more nuances and factual distinctions. This cannot advance the objective of uniformity of decisions, as the Third Circuit proved when it considered this issue.

In 2003 the Third Circuit weighed in on this question in *McCurdy v. Dodd*, 352 F.3d 820 (3rd Cir. 2003). In *McCurdy*, the biological father of the 19 year old decedent brought an action under §1983 alleging a violation of his parental liberty interest. Starting out, the court of appeals in that case was hamstrung by conflicts with other circuits and within the Third Circuit itself. *McCurdy* at 829.6

The court in *McCurdy* decided the matter by borrowing from circuit courts which were already at odds with each other, finding that: 1) a parent's Due Process right to the companionship of a child should not extend indefinitely into a child's adulthood ; and 2) constitutional misconduct resulting in the death of a child, but not deliberately directed at the parent-child relationship should not be actionable. Id. at 829.

But, this decision did not follow an established legal standard but was an *ad hoc* stopgap. No sooner did the Third Circuit make this finding than it retreated from it by explaining the factual nuances that would constitute exceptions to its rule.

After borrowing from the circuit court's holding in *Butera*, the Third Circuit was uncertain at what point a child reached adulthood:

> "[A]dulthood is often a fact-specific inquiry heavily dependent on the unique context of each situation. For this reason, all of the states in our Circuit recognize the more fluid concept of "emancipation," at 830.

The court then tacked on additional exception to the 'fluid concept' of emancipation which muddied the water

further, stating that it "...can conceive of situations where parents in similar circumstances would have a relationship with their adult child which is indistinguishable from a relationship with a minor child." at 830, n 8.

Adding the holdings in *McCurdy*, *Butera* and *Russ* together results in long division rather than addition. These decisions cannot be squared even though one purports to rely upon the other. Even a superficial examination of these similar holdings shows that future conflict in this area is inevitable.

This comparison illustrates the deep divisions that exist among the circuits in this important area of fundamental rights. One court, which purportedly takes guidance from the other, finds itself in disagreement with its sponsor before the ink is dry on its opinion. This result is not surprising, as the circuit courts are now hostages to the facts of each case. The proliferation of conflicting decisions will only increase with each encounter a court has with this question.

One case the lower court did cite for support, *Claybrook v. Birchwell*, 199 F.3d 350 (6th Cir. 2000) is so out of step with controlling law that it is best described as an oddity. Inexplicably, the Sixth Circuit in that case denied that the parent-child relationship is a fundamental right. "In the Sixth Circuit, a section 1983 cause of action is entirely personal to the direct victim of the alleged constitutional tort. (citations omitted). Id. at 357.

IV. THE INTERCIRCUIT CONFLICTS WILL HAVE A NEGATIVE NATIONAL IMPACT BECAUSE OF THE CONCURRENT JURISDICTION OF

THE STATE AND FEDERAL COURT ON THIS ISSUE

The fractures among the federal circuits in this area are magnified because of the concurrent jurisdiction that state and federal courts exercise in this area of law. Federal court jurisdiction under §1983 is not exclusive, but is shared with the state courts of common jurisdiction. 28 U.S.C. §1343(a)(3) *Martinez v. California,* 444 U.S. 277, 284 n 7 (1980) (exercise of jurisdiction over §1983 is consistent with the general rule that where " 'an act of Congress gives a penalty to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some act of Congress, by a proper action in a state court.).

Although the courts of the 50 states share jurisdiction over §1983 actions with the federal district courts, the actions brought in state court are still governed by federal substantive law. The Supreme Court has held that a uniform federal rule is necessary to deter officials from violating federal constitutional rights, as an objective of §1983. *Carlson v. Green,* 446 U.S. 14, 23, (1980). When state court judges are called upon to decide what federal law is controlling, they will be faced with a smorgasbord of different decisions, different reasoning, and constitutional rights which hinge on a variety of factors involving the nature of the family relationship and the motivation of the defendant.

The concurrent jurisdiction of the state courts in these kind of actions has crowned the existing intercircuit conflict with a state law conflict as well. The Supreme Court of Colorado provides a pertinent example, in *Jones v. Hildebrant,*

191 Colo. 1 (1976), *cert. dismissed* 432 U.S. 183 (1977), one of the two cases in which the U.S. Supreme Court granted certiorari and then dismissed it. *See Supra*, p. 7.

The state supreme court in that case held that §1983 does not create a remedy for wrongful death independent of state wrongful death remedies. This holding led that court to affirm a judgment of $1,500 against the defendants for the wrongful death of the plaintiff's fifteen-year-old son, as Colorado's wrongful death statute restricted damages to net pecuniary loss. Id. at 1-2. This holding is in conflict with federal law and the underlying policies of §1983. Nevertheless, as state courts exercise concurrent jurisdiction in §1983 actions it is predictable that state court judges will follow state wrongful death statutes, which statutes limit the kinds and amount of recovery. In *Jones*, the loss of the plaintiff's 15 year old son under Colorado law was $1,500. Id. In *Bell*, Wisconsin's wrongful death act limited recovery to $25,000. *Bell*, at 1250.

The holding in *Jones* is not an aberration. Instead, it provides another compelling reason why this court should grant review in this case. Twice before the U.S. Supreme Court has granted writs of certiorari to decide whether the Due Process Clause protects a parent's interest in the companionship with her child. On both occasions the Supreme Court later dismissed the writs as being improvidently granted. The Colorado Supreme Court's decision in *Jones* was the first writ that this Court granted. After the parties had submitted briefs and the Supreme Court had heard oral argument it dismissed the writ, finding that the plaintiff had not properly raised or preserved a federal constitutional a claim before the U.S. Supreme Court. *Jones v. Hildebrant*, 432 U.S. 183, 186 fn 6 (1977). The writ

of certiorari which had been granted by this court in *Espinoza v. O'Dell*, 633 P.2d 455 (Colo. 1981) was dismissed when this court learned that the decision of the Colorado Supreme Court did not constitute a final judgment. *Espinoza v. O'Dell*, 456 U.S. 430 (1982). Uniformity between state and federal courts in these federal cases is fast becoming a relic.

A. The Lower Court's Holding is in Conflict with the §1983 Policy Objective of deterrence

Lost in the Seventh Circuit's opinion are the twofold policy objectives of §1983, i.e., compensation and deterrence for violations of the Fourteenth Amendment. *Robertson v. Wegmann*, 436 U.S. 584, 590-591 (1991). The relevant circuit cases, without exception, involve the death of a family member as the result of government misconduct, usually the use of excessive force.

As a practical matter, under the holding in *Russ*, an officer who intentionally shoots and kills a child will never be held liable for his actions because his conduct was intended to kill the victim, not disrupt the parent-child relationship. Consequently, any claim which a parent may have will be limited to the states' wrongful death acts, which are inconsistent and poorly designed to accomplish the deterrent objective of §1983. Aside from the conflict that the Seventh Circuit's holding engenders among the circuit courts, it has the effect of nullifying altogether the deterrent objective of §1983 by engrafting a provision onto the statute that is impossible to ever prove, i.e., that the officer's actions were deliberately directed at the parent-child relationship.

CONCLUSION

Ironically, the Seventh Circuit Court of Appeals explained its decision to make its about-face as an effort "to spare the Supreme Court extra work." (App. 11A). (Citing United States v. Hill, 48 F.3d 228, 232 (7th Cir. 1995)(internal citations omitted).) Of course, it does nothing of the sort. The circuit courts are not writing on a clean slate, so each erasure and correction will only add to the mess. This is not a case of extra work for the Supreme Court, but a timely opportunity to give the circuit courts a clean slate. This court should grant this petition.

Respectfully submitted,

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In the
United States Court of Appeals
For the Seventh Circuit

No. 04-3628

ISAAC RUSS and VERA LOVE,

Plaintiffs-Appellants,

v.

VAN B. WATTS, PHILLIP BANAZKIEWICZ,
CITY OF CHICAGO, and ROBERT HELSON,

Defendants-Appellees.

Appeal from the United States District Court for
the Northern District of Illinois, Eastern Division
No. 01 C 4098—Samuel Der-Yeghiayan, *Judge.*

ARGUED MAY 3, 2005—DECIDED JULY 11, 2005

Before FLAUM, KANNE, and SYKES, *Circuit Judges.*

FLAUM, *Chief Judge.* This case arises out of the tragic and fatal shooting of Robert Russ, a 22-year-old student at Northwestern University, by Chicago police officer Van B. Watts. The issue before us is whether the United States Constitution, through the federal civil rights statute 42

U.S.C. § 1983, provides Russ's parents with a cause of action for the loss of the society and companionship of their son. That question leads us to revisit our decision in *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984), in which we held that a parent's constitutional liberty interest in his relationship with his adult son was violated when his son was killed by police. After careful consideration, we conclude that *Bell* was wrongly decided and must be overruled.[1] We hold that the federal Constitution does not allow a parent to recover in such circumstances, and, on this basis, we affirm the district court's entry of summary judgment in favor of defendants.

I. Background

Although the parties vigorously dispute the events that led to the shooting of Russ, it is unnecessary to resolve these factual disputes here. Instead, we construe all facts and draw all reasonable inferences in the light most favorable to plaintiffs, the non-moving party. *Eisencorp, Inc. v. Rocky Mountain Radar, Inc.*, 398 F.3d 962, 965 (7th Cir. 2005).

On June 5, 1999, just a few weeks before his graduation, Robert Russ was driving from the Northwestern campus in Evanston, Illinois to his mother's home in Calumet City, Illinois. At approximately 1:00 A.M., Chicago police officer Phillip Banazkiewicz attempted to pull over Russ's car. When Russ did not stop, a chase ensued, with three officers —

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[1] Because this opinion overrules a prior decision by this Court, we have circulated it among all judges of this Court in regular active service pursuant to Circuit Rule 40(e). No judge favored rehearing the case en banc. Judge Evans did not participate in the decision of whether to hear the case en banc.

Banazkiewicz, Watts, and Deputy Sheriff Robert Helson of the Cook County Sheriff's Department—pursuing Russ in three separate police vehicles.

The chase began as Russ was heading southbound on Lake Shore Drive. It continued onto the Stevenson Expressway (Interstate 55) and then onto the southbound lanes of the Dan Ryan Expressway (Interstate 90/94). The chase finally ended after Russ's car collided with several of the police vehicles. Once stopped, the three police officers exited their vehicles and surrounded Russ's car with their weapons drawn. Officer Watts positioned himself on the driver's side of Russ's vehicle, and Officers Banazkiewicz and Helson stood on the passenger's side. Watts broke the rear window on the driver's side and fired a single shot, striking and killing Russ.

Several months before he was killed, Russ had conceived a child with Erin Lewis. Lewis gave birth to Russ's son on September 26, 1999, over four months after Russ's death. Russ's paternity was confirmed through DNA testing after the child's birth.

A few days after Russ's death, Russ's mother, Vera Love, acting as special administrator of the estate of Robert Russ, filed an action against the City of Chicago in Cook County Circuit Court under the Illinois Wrongful Death Act. Unbeknownst to Love, on January 20, 2000, the probate division of the circuit court declared Russ's and Lewis's child, Robert Anthony Russ, Jr., sole heir to Russ's estate, and appointed Lewis as independent administrator of the estate. Lewis then moved to substitute herself as plaintiff in the wrongful death action. On February 1, 2000, the court granted Lewis's motion during a very brief interval in which Love's counsel, who had been prepared to argue against the

substitution, stepped out of the courtroom. The court then entered an order substituting Lewis for Love as the plaintiff in the wrongful death action. Love immediately moved to vacate the order.

Following full briefing and oral argument, the circuit court denied Love's motion to vacate the order, leaving Lewis as the plaintiff in the wrongful death action. The case went to trial in September 2003. On October 17, 2003, a jury found Watts liable for Russ's death and awarded $9.6 million in damages to Russ's estate.

Following the substitution of Lewis for Love in the state court action, Russ's parents and siblings filed separate actions in federal district court against Officers Watts, Banazkiewicz, and Helson, and the City of Chicago. Their consolidated amended complaint alleged, among other things, that defendants violated plaintiffs' due process right to associate with Russ. On defendant's motion, Judge Gettleman, the district judge to whom this case was originally assigned, dismissed several of plaintiffs' claims, including all claims brought by Russ's siblings. Plaintiffs Vera Love and Isaac Russ also voluntarily dismissed their claims against the City.

This case was reassigned to Judge Der-Yeghiayan in August 2007. After the close of discovery, Russ's parents and the defendant officers cross-moved for summary judgment on the two remaining claims: (i) violation of plaintiffs' right to associate with their son; and (ii) failure to prevent the excessive use of force. The district court granted summary judgment in favor of defendants, concluding that plaintiffs lacked standing to bring the action. Plaintiffs now appeal.

II. Discussion

Summary judgment is appropriate if the evidence presented by the parties "show[s] that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). We review the district court's grant of summary judgment de novo. *Eisencorp*, 398 F.3d at 965.

We held in *Bell* that a father whose son was killed by a Milwaukee police officer during a chase could recover under § 1983 for the violation of his substantive due process right to associate with his son. 746 F.2d at 1243-44.

On February 2, 1958, Milwaukee police officers Thomas Grady, Jr. and Louis Krause observed Daniel Bell, a 23-year-old black man, driving a vehicle that was missing a tail-light. Grady pulled over Bell's car, and Bell jumped out of the car and ran away. *Id.* at 1215. Grady and Krause pursued Bell—first by car, and then on foot. *Id.* Grady was carrying a loaded revolver. As he caught up with Bell, Grady extended his hand to grab Bell. The gun discharged, shooting Bell in the upper back. *Id.* The defendants claimed that the shot was accidental; Bell's family members, who later sued, believed that Grady intentionally pulled the trigger. *Id.* at 1215 n.2.

After determining that Bell was dead, Grady planted a knife in Bell's right hand. He and Krause then agreed on the story they would tell about what had happened: that Bell had jumped out of the car armed with a knife and yelled: "You won't catch me. I'm a holdup man!" *Id.* at 1216. Other witnesses at the scene testified that they saw nothing in Bell's hands nor did they observe Bell swing or lunge at Grady, as the officers claimed. *Id.* at 1221-22.

After an internal investigation, the district attorney and medical examiner held an inquest into Bell's death, which returned a verdict that the killing was justifiable. *Id.* at 1222. Daniel Bell's father, Dolphus Bell, died in 1962 without recovering for the death of his son. *Id.* at 1223.

Twenty years later, in 1978, Krause revealed that he and Grady had lied about what had occurred during the Bell shooting. *Id.* On August 29, 1979, Grady pleaded guilty to homicide by reckless conduct and perjury. He was sentenced to seven years of imprisonment and was paroled after three years. *Id.*

In October 1979, Daniel Bell's sister and eleven brothers filed suit in federal court on behalf of themselves, the estate of Daniel Bell, and the estate of Dolphus Bell. *Id.* at 1224. Their complaint named as defendants Officer Grady, the City of Milwaukee, former Police Chief Johnson, and former Detective Sergeant Shaffer, and alleged various constitution- al violations arising out of the killing of Daniel Bell. After a ten-week trial, the jury found, among other things, that Grady violated Daniel Bell's constitutional rights by shooting and killing him, and awarded Daniel Bell's estate $100,000 in compensatory damages and $25,000 in punitive damages. *Id.* at 1225. The jury awarded the estate of Dolphus Bell $75,000 for the loss of society and companionship of Daniel Bell, plus funeral expenses, and awarded a total of $100,000 to Daniel's twelve siblings for the loss of society and companionship. The jury also found that the defendants had conspired to cover up the facts of the shooting of Daniel Bell, depriving his family of due process of law and racial equality, and awarded compensatory and punitive damages. *Id.*

The defendants raised numerous issues on appeal,

challenging the constitutional and statutory underpinnings of the plaintiffs' claims. We upheld the award to Dolphus Bell's estate for the loss of society and companionship, concluding that Daniel Bell's father "possessed a constitutional liberty interest in his relationship with his son." *Id.* at 1243. In reaching this conclusion, we relied on the Supreme Court decisions "examining the parameters of the constitutional protection afforded the parent-child relationship." *Id.* (citing *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *May v. Anderson*, 345 U.S. 528, 533 (1953); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)). We also found support in the Supreme Court decisions protecting the parental relationship from state interference. We concluded:

> The due process clause requires that severances in the parent-child relationship caused by the state occur only with rigorous protections for the individual liberty interests at stake. The state may not separate the parent from the child, even temporarily, without according them due process of law to protect their liberty interests.

Id. at 1243-44 (citing *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 27 (1981); *Little v. Streater*, 452 U.S. 1, 13 (1981); *Smith v. Org. of Foster Families*, 431 U.S. 816, 842, 846 (1977); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)).

We held that Daniel's status as an adult living on his own at the time he was killed did not preclude recovery, stating, "we are unpersuaded that a constitutional line based solely on the age of the child should be drawn." *Id.* at 1245. We explained that "[t]he Supreme Court's decisions protect more than the custody dimension of the parent-child relationship" and that the protected relationship "includes the parent's

'interest in the companionship, care, custody, and management' of the child." *Id.* (quoting *Stanley*, 405 U.S. at 651). We also noted that Daniel Bell was single, had no children, and had not become part of another family unit. "[H]is father's family was his immediate family." *Id.* Moreover, we observed, the Wisconsin wrongful death statute permitted recovery for loss of society and companionship regardless of the age of the child at his death. *Id.* (citing Wis. Stat. § 895.04(4)). We therefore concluded that Daniel's age and separate residence were matters for the jury to consider when determining damages, but were not a bar to recovery. *Id.*

Our opinion declined to extend constitutional protection to the relationship between Bell and his siblings, remarking that were we to rule otherwise, "there could be no principled way of limiting such a holding to the immediate family or perhaps even to blood relationships." *Id.* at 1247. We noted that Supreme Court decisions examining the Fourteenth Amendment liberty interests were based primarily on the parents' constitutional right to raise, associate with, and make decisions affecting the family, even though they also alluded to the importance of the integrity of the family unit as a whole. *Id.* at 1245-46.

In support of their motion for summary judgment before the district court, defendants argued that Russ's parents Because, as explained below, our holding rests on a different basis, we need not decide whether the record supports the district court's conclusion. *See Peele v. Country Mut. Ins. Co.*, 288 F.3d 319, 332 (7th Cir. 2002) ("An appellate court may affirm the district court's decision on any ground supported by the Record, even if different from the grounds relied upon by the district court."). lacked standing because Russ had formed a new family unit with Lewis. Based on our statement in *Bell*

that Daniel's "father's family was his immediate family," the district court concluded that the crucial issue in determining whether Russ's parents had standing to recover for the loss of society and companionship of their son was whether Russ had become part of another family unit.

To answer this question, the district court relied on the following facts admitted by plaintiffs: (i) at the time of his death, Russ lived on campus at Northwestern; (ii) when Erin Lewis learned she was pregnant with Russ's child, they discussed the pregnancy; and (iii) before his death, Russ was making plans to care for his unborn son. In addition, the district court relied on defendants' allegation that Russ and Lewis had discussed moving in together to raise their son. Although plaintiffs disputed this fact, the district court concluded that they had failed to provide any citations in the record to support their denial.

The district court thus concluded: "It is clear from the facts and the totality of the circumstances before us that Russ was no longer living at home at the time of his death and that he had formed a new family unit." *Russ v. Watts*, 2004 WL 1459262, at *4 (N.D. Ill. June 18, 2004). Based on this conclusion, the district court held that "Russ' parents have not shown that they have standing to proceed in this suit" and granted summary judgment in favor of all remaining defendants. *Id.*2

Since *Bell*, several of our sister circuits have considered whether the Constitution protects a parent's relationship with his adult children in the context of state action which has the incidental effect of severing that relationship. No other court of which we are aware has allowed a parent to recover for the loss of his relationship with his child in these circumstances. Most

courts that have considered the issue have expressly declined to find a violation of the familial liberty interest where the state action at issue was not aimed specifically at interfering with the relationship. *See Trujillo v. Bd. of County Comm'rs*, 768 F.2d 1186, 1190 (10th Cir. 1985) (plaintiffs' § 1983 action for the wrongful death of their son and brother while he was in state custody was properly dismissed because plaintiffs did not allege that defendants intended to deprive them of their protected relationship with the decedent); *Valdivieso Ortiz v. Burgos*, 807 F.2d 6, 9 (1st Cir. 1986) (declining to find violation of substantive due process right based on government action causing only an "incidental deprivation" of the relationship between appellants and their adult relative when he was allegedly beaten to death by guards while in prison); *McCurdy v. Dodd*, 352 F.3d 820, 830 (3d Cir. 2003) (where officer shot and killed individual after he refused demands to hold up his hands, father could not recover for deprivation of his relationship with his son because the official action was not "directed at the parent-child relationship"); *see also Claybrook v. Birchwell*, 199 F.3d 350, 357-58 (6th Cir. 2000) (adult children whose father was shot by police officers could bring action under § 1983 only as administrators of father's estate, not for any collateral injuries suffered by themselves personally); *Shaw v. Stroud*, 13 F.3d 791, 804-05 (4th Cir. 1994) (declining to recognize wife and minor child's Fourteenth Amendment claim for loss of love and support of their husband and father after he was shot by police officer). *But see Kelson v. City of Springfield*, 767 F.2d 651, 655 (9th Cir. 1985) (parents had a constitutionally protected liberty interest in the companionship and society of their 14-year-old son and stated claim under § 1983 against school officials after their son committed suicide while at school).

Courts have also been reluctant to extend the

constitutional protections afforded the parent-child relationship to cases involving adult children. *See Valdivieso Ortiz*, 807 F.2d at 8 (noting that decedent was over 21 at the time of his death and was "not a minor child still within 'the care, custody, and management' of his parents"); *Butera v. District of Columbia*, 235 F.3d 637, 656 (D.C. Cir. 2001) (holding that a "parent does not have a constitutionally protected liberty interest in the companionship of a child who is past minority and independent"); *McCurdy*, 352 F.3d at 829 (parental liberty interest as defined by the Supreme Court "must cease to exist at the point at which a child begins to assume that critical decisionmaking responsibility for himself or herself").

An analysis of the decisions of our sister circuits as well as a reexamination of our own rationale in *Bell* convinces us that *Bell* was wrongly decided. We do not make such a declaration lightly. Although we must give considerable weight to our prior decisions, we are not bound by them absolutely and may overturn Circuit precedent for compelling reasons. *In re Bentz Metal Prods. Co.*, 231 F.3d 1029, 1033 (7th Cir. 2000). Other circuits' rejection of our position provides one such compelling reason. As we have previously explained:

> When a number of other circuits reject a position that we have taken, and no other circuit accepts it, the interest in avoiding unnecessary intercircuit conflicts comes into play; and if we are asked to reexamine our position, we can hardly refuse. That is not to say that reexamination will cause us to relinquish the position. . . . But if upon conscientious reexamination we are persuaded that the other circuits have the better of the argument, we should abandon our position in order to spare the Supreme Court extra work.

United States v. Hill, 48 F.3d 228, 232 (7th Cir. 1995) (internal citations omitted).

That *Bell* stands alone causes us to reconsider its holding. We now see that our conclusion that Dolphus Bell's parental liberty interest was violated by the killing of his son was not well grounded in the Constitution or Supreme Court case law. The Supreme Court has recognized violations of the due process liberty interest in the parent-child relationship only where the state took action specifically aimed at interfering with that relationship. As the Supreme Court has explained, "[h]istorically, the guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property." *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (collecting cases).

The Supreme Court has "always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (citations omitted). The Court has cautioned that we must "exercise the utmost care" in extending constitutional protection to an asserted right or liberty interest because, in doing so, we "place the matter outside the arena of public debate and legislative action." *Id.* With these principles in mind, we turn to the liberty interest asserted by plaintiffs.

Although it is well established that parents have a fundamental constitutional liberty interest in the "care, custody, and control of their children," *Troxel v. Granville*, 530 U.S. 57, 65 (2000), the appropriate framework for analyzing claims alleging a violation of this interest is less than clear. *Doe v. Heck*, 327 F.3d 492, 519 (7th Cir. 2003); *Galdikas v. Fagan*, 342 F.3d 684, 689-90 (7th Cir. 2003), *abrogated on other*

grounds by Spiegla v. Hull, 371 F.3d 928 (7th Cir. 2004). In *Glucksberg*, the Supreme Court articulated a two-part analysis for substantive due process claims:

> First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed. Second, we have required in substantive-due-process cases a careful description of the asserted fundamental liberty interest.

521 U.S. at 720-21 (internal citations omitted). The Court suggested that a strict scrutiny test applies, stating that "the Fourteenth Amendment 'forbids the government to infringe fundamental liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.' " *Id.* at 721 (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)). The following term, in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), the Court suggested that the analytical framework differs depending on whether the government action at issue is legislation or a specific act of a governmental officer. *Id.* at 846. Observing that the Due Process Clause was "intended to prevent government officials from abusing their power, or employing it as an instrument of oppression," the Court determined that the appropriate test with respect to executive action is whether the executive has abused its power in a way that "shocks the conscience." *Id.* at 846-47. The interrelationship between *Glucksberg* and *Lewis* has been a source of considerable confusion. *See Galdikas*, 342 F.3d at 690 n.3. Further complicating matters, in *Troxel*, a plurality of the Court used a "combination of factors" test to hold that a state's visitation

statute, as applied, unconstitutionally infringed on parents' fundamental right to rear their children. 530 U.S. at 72-73; *Heck*, 327 F.3d at 519.

In deciding this case, we need not resolve the issue of precisely what level of scrutiny should apply to allegations of government interference with the parental liberty interest. Under any standard, finding a constitutional violation based on official actions that were not directed at the parent-child relationship would stretch the concept of due process far beyond the guiding principles set forth by the Supreme Court. *See McCurdy*, 352 F.3d at 830; *Valdivieso Ortiz*, 807 F.2d at 9.

Our finding of a constitutional violation in *Bell* was not appropriately moored to Supreme Court precedents establishing the contours of the parental liberty interest. The decisions on which we relied as "indicat[ing] that Daniel Bell's father possessed a constitutional liberty interest in his relationship with his son" all dealt with the right to procreate and make decisions about rearing one's minor children without state inference. *See Meyer*, 262 U.S. at 400 (right of parents to engage teacher to instruct child in foreign language); *Skinner*, 316 U.S. at 541 (state-imposed sterilization "forever deprives" individual of a "basic liberty"); *Prince*, 321 U.S. at 165-66 (parental right to give children religious training and encourage them in practice of religious beliefs); *May*, 345 U.S. at 534 (mother's right to custody and "immediate possession" of her minor children). These precedents certainly did not compel the result we reached in *Bell*.

Similarly, all the cases we cited in *Bell* for the proposition that the state may interfere with the parental relationship only after providing sufficient procedural protection involved state action that purposefully interfered

with the family relationship. *See Lassiter*, 452 U.S. at 31 (addressing due process requirements in parental termination proceedings); *Little*, 452 U.S. at 16-17 (due process obligates state to aid putative father in obtaining blood test in paternity proceeding where state is adversary); *Smith*, 431 U.S. at 854-56 (examining constitutional adequacy of notice, pre-removal conference, and post-removal hearing in administrative action to remove child from custody of foster parents); *Stanley*, 405 U.S. at 649 (due process entitles unwed father to a hearing on his fitness as a parent before removing minor children from his custody); *see also Caban v. Mohammed*, 441 U.S. 380, 394 (1979) (state law allowing adoption of minor children born out of wedlock without consent of father who has "manifested a significant paternal interest in the child[ren]" violated equal protection); *Quilloin v. Walcott*, 434 U.S. 246, 254-55 (1978) (adoption of illegitimate minor child despite objection of natural father who had no ongoing relationship with child did not violate equal protection or substantive due process).

Neither *Bell* nor the instant case involved intentional action by the state to interfere with a familial relationship; plaintiffs in this case have not alleged that Watts shot Russ for the specific purpose of terminating Russ's relationship with his family. Affording plaintiffs a constitutional due process right to recover against the state in these circumstances would create the risk of constitutionalizing all torts against individuals who happen to have families. Upon reconsideration, we now recognize that the finding of a violation of the parental liberty interest in *Bell* is no longer supportable. Furthermore, although we need not impose an absolute rule that parents of adult children lack any liberty interest in their relationship with their children, we agree with our sister circuits that minor children's need for the guidance and support of their parents warrants "sharply different constitutional treatment." *Butera*, 235 F.3d at

656; *McCurdy*, 352 F.3d at 829.

We therefore overrule our decision in *Bell* insofar as it recognized a constitutional right to recover for the loss of the companionship of an adult child when that relationship is terminated as an incidental result of state action. Having concluded that Russ's parents have no constitutional right to recover for the loss of society and companionship of Russ in these circumstances, we need not address the other issues raised by the parties.

III. Conclusion

For the foregoing reasons, we affirm the entry of summary judgment in favor of defendants.
A true Copy:
Teste:

_____
Clerk of the United States Court of Appeals for the Seventh Circuit

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

August 8, 2005

Hon. JOEL M. FLAUM, *Chief Judge*
Hon. MICHAEL S. KANNE, *Circuit Judge*
Hon. DIANE S. SYKES, *Circuit Judge*

ISAAC RUSS and VERA LOVE,	] Appeal from the
	]United States District
Plaintiffs-Appellants,	]Court for the Northern
	] District of Illinois,
	] Eastern Division.
No. 04-3628 *v.*	]
	] No. 01 C 4098
VAN B. WATTS, PHILLIP	]
BANAZKIEWICZ,	]
CITY OF CHICAGO, and	]
ROBERT HELSON,	] Samuel Der-
	]Yeghiayan, *Judge*.
Defendants-Appellees.	]

ORDER

On July 25, 2005, plaintiffs-appellants filed a petition for rehearing and petition for rehearing en banc. None fo the judges in active service had requested a vote on the petition for rehearing en banc, and all fo the judges on the original panel have voted to deny a rehearing. The petition for rehearing and petition for rehearing en banc are therefore DENIED.

United States District Court,

N.D. Illinois, Eastern Division.

Christopher RUSS, et al., Plaintiffs,

v.

VAN WATTS, et al., Defendants.

No. 01 C 4098.

June 18, 2004.

Michael J. O'Rourke, O'Rourke, McCloskey & Moody, Daniel K. Touhy, Timothy J. Touhy, Touhy & Touhy Ltd., Chicago, IL, for Plaintiffs.

Thomas R. Samson, Sheri H. Mecklenburg, Liza Marie Franklin, Michael Thomas Donovan, Sharon Baldwin, Department of Law, Paul Anthony Castiglione, Michael David Jacobs, Cook County State's Attorney, Allen Duarte, Ancel, Glink, Diamond, Bush, DiCianni & Rolek, P.C., Mara Stacy Georges, Corporation Counsel, Chicago, IL, for Defendants.

MEMORANDUM OPINION

DERYEGHIAYAN, J.

This matter is before the court on Plaintiffs' motion for summary judgment, on Defendants Van Watts', IV ("Watts") and Philip Banaszkiewicz's ("Banaszkiewicz") motion for summary judgment, and on Defendant Robert Helson's ("Helson") motion for summary judgment. For the reasons stated below we deny Plaintiffs' motion for summary judgment and grant the motion for summary judgment brought by Watts and Banaszkiewicz and grant the motion for summary judgment brought by Helson.

BACKGROUND

Watts, Banaszkiewicz, and Helson are police officers that work for the City of Chicago ("City"). On June 5, 1999, Banaszkiewicz claims that he spotted a car being driven by Russ which cut across two lanes of traffic and nearly collided with two motorcyclists. Banaszkiewicz claims that he pulled behind Russ' car and turned on his blue lights. According to Banaszkiewicz, Russ did not stop until he reached a red light. Banaszkiewicz claims that he was wearing his uniform and that he exited his vehicle and knocked on the driver's side window of Russ' car, but Russ ignored him and when the light changed to green, Russ proceeded onward. Helson, who was driving home from a part-time security job, claims that he saw Russ start off with the green light, leaving Banaszkiewicz behind. Banaszkiewicz called for backup and Watts was called in to assist in the pursuit. A chase ensued and Russ finally stopped when he collided with other Chicago Police vehicles.

Banaszkiewicz and Helson approached the passenger's side window and Watts approached the driver's side of the car. Helson claims that he managed to crack open the passenger's side door and was able to calmly tell Russ that he was surrounded and that "he was not helping himself." Watts then broke the rear driver's side window of the car. Defendants claim that Russ reacted by reaching for Watts' gun. Defendants claim that Russ grabbed Watts' gun and after a few seconds of a struggle the gun discharged, killing Russ. At the time of his death Russ was twenty-two years old and was a student at Northwestern University.

The administrator of Russ' estate brought a suit against Watts and the City on behalf of Russ' son, Robert Russ Jr., and the child's mother Erin Lewis ("Lewis") in Illinois state court

for wrongful death and survival. A jury awarded Russ' estate $9.6 million. In the instant case, the Plaintiffs are Russ' parents and siblings who brought claims against the City, Watts, Banaszkiewicz, and Helson. Plaintiffs include in their amended complaint two substantive due process claims alleging violations of 42 U.S.C. § 1983 ("Section 1983") based on a severance of family relationships between Russ and his parents and Russ and his siblings (Counts I and II). Plaintiffs also brought a Section 1983 failure to prevent the use of excessive force claim (Count III), a Section 1983 conspiracy claim (Count TV), and a Section 1983 Monell claim against the City. Russ' siblings also allege violations of 42 U.S.C. § 1985 ("Section 1985") involving an alleged conspiracy to deny Russ' siblings access to the court system (Count VI). On March 15, 2002, Judge Gettleman, the prior judge in this case, granted Defendants' motion to dismiss all of the Section 1983 claims brought by Russ' siblings because his siblings did not have standing (Count II). Judge Gettleman also granted Defendants' motion to dismiss Russ' siblings' Section 1985 claims (Count VI). On April 30, 2004, Plaintiffs voluntarily dismissed the Monell claim against the City (Count V).

LEGAL STANDARD

Summary judgment is appropriate when the record reveals that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). In seeking a grant of summary judgment the moving party must identify "those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) (quoting Fed.R.Civ.P. 56(c). This initial

burden may be satisfied by presenting specific evidence on a particular issue or by pointing out "an absence of evidence to support the non-moving party's case." *Id.* at 325. Once the movant has met this burden, the non-moving party cannot simply rest on the allegations or denials in the pleadings, but, "by affidavits or as otherwise provided for in [Rule 56], must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). A "genuine issue" in the context of a motion for summary judgment is not simply a "metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). Rather, a genuine issue of material fact exists when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Insolia v. Philip Morris, Inc.*, 216 F.3d 596, 599 (7th Cir.2000). The court must consider the record as a whole, in a light most favorable to the non-moving party, and draw all reasonable inferences that favor the non-moving party. *Anderson*, 477 U.S. at 255; *Bay v. Cassens Transport Co.*, 212 F.3d 969, 972 (7th Cir.2000).

DISCUSSION

Defendants argue that Russ' parents lack standing to bring the instant suit. This issue was raised before Judge Gettleman in Defendants' motion to dismiss and on March 15, 2002, Judge Gettleman denied Defendants' motion to dismiss the parental claims due to a lack of standing. Judge Gettleman concluded that *Bell v. Milwaukee*, 746 F.2d 1205 (7th Cir.1984) is applicable to the claims of Russ' parents in the instant case and denied Defendants' motion to dismiss the parental claims based on a lack of standing. After the completion of discovery,

Defendants now argue that they are entitled to summary judgment because Russ' parents lack standing. Plaintiffs offer no arguments on this issue in their answer to the instant motions. Plaintiffs state only that Judge Gettleman already decided the issue and Plaintiffs incorrectly state that Defendants have asked this court to "overrule the holding of the Seventh Circuit Court of Appeals in *Bell v. Milwaukee*, 746 Fd.2d [sic] 1205 (7th Cir.1984) which allows the plaintiffs to maintain this action." (P. Ans.2).

First of all, as we will explain below, we are not precluded from addressing this issue merely because of Judge Gettleman's ruling on Defendants' motion to dismiss. Secondly, Defendants have not asked this court to overrule *Bell* as Plaintiffs contend. Rather, Defendants ask this court to distinguish the instant case from *Bell*. This court has no authority whatsoever to overrule a decision of the Seventh Circuit. However, this court can address whether the instant case is distinguishable from *Bell*.

In *Bell* the Seventh Circuit held that a parent of a decedent had standing to bring a civil rights action based on the parent's constitutionally protected interest in maintaining a relationship with his child. *Id.* at 1244-45. The Seventh Circuit held that the plaintiff parent could bring a Section 1983 claim based upon the severance of the relationship between himself and his child despite the fact that, in that case, the parent's child was 23 years old when shot by police and was no longer a minor. *Id.* The Seventh Circuit also stated, in finding that the plaintiff parent had standing, that the child "had no children[,] ... had not become a part of another family unit ... [and] his father's family was his immediate family." *Id.* at 1245.

Judge Gettleman denied Defendants' motion to dismiss

the parental claims based upon a lack of standing and his ruling is entitled to some deference. A subsequent judge sitting in a case cannot alter the prior judge's ruling "merely because he has a different view of the law or facts from the first judge." *Williams v. C.I.R.*, 1 F.3d 502, 503 (7th Cir.1993)(stating that "litigants have a right to expect that a change in judges will not mean going back to square one."). However, a subsequent judge in a case may rule differently "if new information convinces him" that the prior ruling was incorrect. *Id.* Such is the case here. We have more facts before us than Judge Gettleman had before him in March of 2002. Our ruling on this issue does not mean that we are returning to "square one." Rather, our ruling is a part of the natural progression in these proceedings as they evolve from the pleadings to discovery to dispositive motions.

Judge Gettleman, in making his ruling on Defendants' motion to dismiss parental claims, made it clear that he could not rule in Defendants' favor on the parental standing issue based on the limited information that he had before him. For instance, Judge Gettleman stated that the only fact before him that differentiated this case from *Bell* was that Russ had "impregnated a woman" prior to his death and Judge Gettleman stated that he was hesitant to "deviate from *Bell's* clear holding *based on th[at] fact alone." Russ v. Watts*, 190 F.Supp.2d 1094, 1099 (N.D.Ill.2002)(emphasis added)(stating in addition that he could not rule against the parents "as the facts now stand"). Judge Gettleman stated that he did not know whether "Russ and the mother of his child had formed their own family unit" and indicated that it is possible that "Russ and the mother of his child had not interacted at all since the child's inception...." *Id.* Judge Gettleman was clearly inhibited in making an informed decision because the issue was presented to him at the motion to dismiss stage. We sit in a unique position having all of the fruits of discovery and evidence before us to assist us in our

determination.

Judge Gettleman correctly concluded that "to answer the question of [parental] standing in the instant case, the court must determine whether Russ had become part of another family unit." *Id.* In the instant case, Plaintiffs admit pursuant to Local Rule 56.1, that, at the time of his death, Russ did not live at home, but rather lived on campus at Northwestern University. (R W & B SF 8). Plaintiffs admit, pursuant to Local Rule 56.1, that "[w]hen Erin Lewis learned that she was pregnant with Robert Russ' child, they discussed the pregnancy." (R W & B SF 9). Plaintiffs admit that "[b]efore his death, Robert Russ was making plans for taking care of his unborn son." (R W & B SF 10). Watts and Banaszkiewicz allege as 56.1 fact number 13 that "Robert Russ and Erin Lewis discussed moving into together [sic] to raise their son." (R W & B SF 13). Plaintiffs dispute the fact. However, in denying Watts' and Banaszkiewicz's 56.1 fact number 13, Plaintiffs fail to directly respond to the asserted fact and fail to provide any citations to support their denial as is required by Local Rule 56.1. Local Rule 56.1(b)(3)(A); *Dent v. Bestfoods,* 2003 WL 22025008, at *1 n. 1 (N.D.Ill.2003); *Jankovich v. Exelon Corp.,* 2003 WL 260714, at *5 (N.D.Ill.2003)(indicating that evasive denials that do not directly oppose an assertion are improper and thus the contested fact is deemed to be admitted pursuant to Local Rule 56.1). In response to Watts' and Banaszkiewicz's statement of fact indicating that Russ and Lewis discussed moving in together to raise their son, Plaintiffs contend that Russ had sexual relations with Lewis only once, that Russ was not sure that Lewis was carrying his child, and that Russ "never indicated that he was going to move in [sic] or marry Erin Lewis." (R W & B SF 13). None of Plaintiffs' facts respond directly to Watts' and Banaszkiewicz's 56.1 fact number 13. Therefore, Plaintiffs admit that Russ and Lewis discussed

moving in together to raise their son.

We emphasize that we are not merely making findings based upon meaningless procedural technicalities. A court is not "obliged in our adversary system to scour the record looking for factual disputes and may adopt local rules reasonably designed to streamline the resolution of summary judgment motions." *Waldridge v. American Hoechst Corp.*, 24 F.3d 918, 922 (7th Cir.1994). Local Rule 56.1 requires a non-movant to point to the evidence that supports his view on a factual issue if the non-movant contends that there is a legitimate dispute regarding that issue to be settled at trial. A party is not entitled to proceed to trial and hope the jury will speculate, in the absence of evidence, to support the party's position. In this case Defendants have cited the deposition testimony of Lewis and Plaintiffs have merely attempted to side step the issue by providing an evasive reply. Furthermore, Plaintiffs have failed to cite to any evidence whatsoever that they could present at trial that would allow a reasonable jury to find in their favor on the issue of whether or not Russ and Lewis discussed moving in together and raising their son.

It is clear from the facts and the totality of the circumstances before us that Russ was no longer living at home at the time of his death and that he had formed a new family unit. The evidence reflects that he planned to move in with Lewis and raise his son. Plaintiffs admit, pursuant to Local Rule 56.1, that "[b]efore his death, Robert Russ was making plans for taking care of his unborn son." (R M & W 10). Plaintiffs admit, pursuant to Local Rule 56.1, that Russ was " 'looking forward' to becoming a father." (R M & W SF 14). We find it commendable that Russ would take responsibility for his child's welfare. Plaintiffs also admit, pursuant to Local Rule 56.1, that Russ' mother stated at her deposition that Russ was "a grown

man and he could handle his own business." (Love Dep. 82)(R W & B SF 16). This further demonstrates that Russ' parents were no longer his immediate family unit. It was Russ' newly formed family unit consisting of his son and his son's mother that recovered the $9.6 million in state court for the shooting incident. (R M & W SF 46). It was Lewis, acting as mother and guardian of Robert Russ, Jr. and as the administrator of the estate of Robert Russ that filed the second amended complaint in Illinois state court and who received the jury award. (R M & W SF 45). There are ample facts that distinguishes this case from *Bell*. There is no indication that *Bell* intended to expand standing for Section 1983 claims to the extent sought in this suit. In fact, the court in *Bell* recognized that there were limitations to standing for such Section 1983 suits when the court ruled that siblings did not have standing to bring such Section 1983 suits. 746 F.2d at 1247. Russ' parents have not shown that they have standing to proceed in this suit. Therefore, we grant summary judgment for all the remaining Defendants.

CONCLUSION

Based on the foregoing analysis, we grant the motions for summary judgment brought by all remaining Defendants and deny Plaintiffs' motion for summary judgment.

NORTHERN DISTRICT OF ILLINOIS
Eastern Division

DOCKETED
Jun 18 2004

Christopher Russ

v.

Van Watts, et. al.,

JUDGMENT IN A CIVIL CASE
Case NUMBER: 01 C 4098

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

■ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that for the reasons stated in the Court's 06/17/04 memorandum opinion, defendants Watts', Banaszkiewicz's and Helson's motions for summary judgment are granted. Plaintiffs' motion for summary judgment is denied.

Michael W. Dobbins, Clerk of Court

Date:6/17/2004

s_____
Michael A. Wing, Deputy Clerk

United States District Court,

N.D. Illinois, Eastern Division.

Christopher RUSS, et al., Plaintiffs,

v.

VAN WATTS, et al., Defendants.

No. 01 C 4098.

Sept. 10, 2004.

Michael J. O'Rourke, O'Rourke, McCloskey & Moody, Chicago, IL, Daniel K. Touhy, Timothy J. Touhy & Assoc., Timothy J. Touhy, Touhy & Touhy Ltd., Chicago, IL, for Plaintiffs. Thomas R. Samson, Sheri H. Mecklenburg, Liza Marie Franklin, Michael Thomas Donovan, Paul Anthony Castiglione, States Attorney of Cook County, Michael David Jacobs, Allen Duarte, Ancel, Glink, Diamond, Bush, Dicianni & Rolek, P.C., Sharon Baldwin, Mara Stacy Georges, Corporation Counsel, Chicago, IL, for Defendants.

MEMORANDUM OPINION

DERYEGHIAYAN, J.

This matter is before the court on Plaintiffs' motion for clarification and motion for reconsideration. For the reasons stated below, we enter final judgment dismissing the claims brought by Russ' siblings and deny the motion for reconsideration.

BACKGROUND

Watts, Banaszkiewicz, and Helson are police officers that work for the City of Chicago ("City"). On June 5, 1999, Banaszkiewicz claims that he spotted a car being driven by

Robert Russ ("Russ") which cut across two lanes of traffic and nearly collided with two motorcyclists. Banaszkiewicz claims that he pulled behind Russ' car and turned on his blue lights. According to Banaszkiewicz, Russ did not stop until he reached a red light. Banaszkiewicz claims that he was wearing his uniform and that he exited his vehicle and knocked on the driver's side window of Russ' car, but Russ ignored him and when the light changed to green, Russ proceeded onward. Helson, who was driving home from a part-time security job, claims that he saw Russ start off with the green light, leaving Banaszkiewicz behind. Banaszkiewicz called for backup and Watts was called in to assist in the pursuit. A chase ensued and Russ finally stopped when he collided with other Chicago Police vehicles.

Banaszkiewicz and Helson approached the passenger's side window and Watts approached the driver's side of the car. Helson claims that he managed to crack open the passenger's side door and was able to calmly tell Russ that he was surrounded and that "he was not helping himself." Watts then broke the rear driver's side window of the car. Defendants claim that Russ reacted by reaching for Watts' gun. Defendants claim that Russ grabbed Watts' gun and after a few seconds of a struggle the gun discharged, killing Russ. At the time of his death Russ was twenty-two years old and was a student at Northwestern University.

The administrator of Russ' estate brought a suit against Watts and the City on behalf of Russ' son, Robert Russ Jr., and the child's mother Erin Lewis ("Lewis") in Illinois state court for wrongful death and survival. A jury awarded Russ' estate $9.6 million. In the instant case, the Plaintiffs are Russ' parents and siblings who brought claims against the City, Watts, Banaszkiewicz, and Helson. Plaintiffs include in their amended

complaint two substantive due process claims alleging violations of 42 U.S.C. § 1983 ("Section 1983") based on a severance of family relationships between Russ and his parents and Russ and his siblings (Counts I and II). Plaintiffs also brought a Section 1983 failure to prevent the use of excessive force claim (Count III), a Section 1983 conspiracy claim (Count IV), and a Section 1983 Monell claim against the City. Russ' siblings also allege violations of 42 U.S.C. § 1985 ("Section 1985") involving an alleged conspiracy to deny Russ' siblings access to the court system (Count VI). On March 15, 2002, Judge Gettleman, the prior judge in this case, granted Defendants' motion to dismiss all of the Section 1983 claims brought by Russ' siblings because his siblings did not have standing (Count II). Judge Gettleman also granted Defendants' motion to dismiss Russ' siblings' Section 1985 claims (Count VI). On April 30, 2004, Plaintiffs voluntarily dismissed the Monell claim against the City (Count V). The remaining defendants filed motions for summary judgment and on June 17, 2004, we granted the remaining defendants' motions for summary judgment in their entirety and judgment was entered on the record on June 18, 2004. On July 2, 2004, Plaintiffs filed a motion to alter and vacate the June 18, 2004, judgment.

LEGAL STANDARD

Rule 59(e) permits parties to file, within ten days of the entry of a judgment, a motion to alter or amend the judgment. Fed.R.Civ.P. 59(e); Fed.R.Civ.P. 6(a). Rule 59(e) motions do not give a party the opportunity to rehash old arguments or to present new arguments "that could and should have been presented to the district court prior to the judgment." *Moro v. Shell Oil Co.*, 91 F.3d 872, 876 (7th Cir.1996)(citing *LB Credit Corp. v. Resolution Trust Corp.*, 49 F.3d 1263, 1267 (7th Cir.1995)). Rather, a Rule 59(e) motion "must clearly establish either a manifest error of law or fact or must present newly discovered evidence" in order to be successful. *LB Credit*

Corp., 49 F.3d at 1267 (quoting *Federal Deposit Ins. Corp. v. Meyer*, 781 F.2d 1260, 1268 (7th Cir.1986)). The decision of whether to grant or deny a Rule 59(e) motion "is entrusted to the sound judgment of the district court...." *In re Prince*, 85 F.3d 314, 324 (7th Cir.1996).

DISCUSSION

I. Motion For Clarification

Plaintiffs seek clarification of our ruling on June 17, 2004, granting summary judgment in favor of the remaining defendants on claims brought by Russ' parents. Plaintiffs contend that when Judge Gettleman dismissed the claims brought by Russ' siblings, Judge Gettleman did not make a determination regarding whether or not Russ' siblings could bring an immediate appeal. Plaintiffs argue that there is technically not a final judgment as defined under Federal Rule of Civil Procedure 54(b). To the extent that there is not a final and appealable judgment dismissing the claims brought by Russ' siblings we enter final judgment at this juncture.

II. Motion To Reconsider

Plaintiffs do not base their motion for reconsideration upon any of the acceptable bases for a motion for reconsideration. Plaintiffs argue merely that this court should re-evaluate its prior ruling. However, a motion for reconsideration is not a vehicle that can be used to take a second pass at a ruling to see if the court will rule differently the second time around. *See Moro*, 91 F.3d at 876(stating that Rule 59(e) motions do not give a party the opportunity to rehash old arguments or to present new arguments "that could and should have been presented to the district court prior to the judgment.").

Plaintiffs have inappropriately raised arguments that they raised in their response to the motions for summary judgment and arguments that they could have raised in response to the motions for summary judgment. For instance, Plaintiffs argue that there is sufficient evidence to dispute Watts' and Banaszkiewicz's statement of fact number 13. However, Plaintiffs fail to address the analysis in our prior ruling and Plaintiffs attempt to point to evidence that Plaintiffs did not refer to in their answer briefs to Defendants' motions for summary judgment.

Plaintiffs fail to address Local Rule 56.1 and the effects of Plaintiffs' 56.1 response under that rule which we discussed in our prior ruling. We explained in our prior ruling that we were not merely making findings based upon meaningless procedural technicalities because a court is not "obliged in our adversary system to scour the record looking for factual disputes and may adopt local rules reasonably designed to streamline the resolution of summary judgment motions." *Waldridge v. American Hoechst Corp.*, 24 F.3d 918, 922 (7 th Cir.1994). Statement of fact 13 reads as follows: "Robert Russ and Erin Lewis discussed moving into [sic] together to raise their son." In their 56.1 response to statement of fact 13 Plaintiffs merely pointed to Vera Love's ("Love") claim that Russ only had sexual relations with Lewis once and Russ was not sure if Lewis' child was his own. Plaintiffs also state in their 56.1 response to statement of fact 13 that Russ never indicated that he was going to move in with Lewis. Whether or not Russ thought Lewis was carrying his child, the frequency of sexual relations between Russ and Lewis, and whether or not Russ indicated he was going to move in with Lewis, do not in any way address statement of fact 13 which indicates that Russ and Lewis discussed moving in together. Thus, Plaintiffs' response does not directly respond to the asserted fact.

Plaintiffs also contend that they provided sufficient citations simply because they made reference to "Exhibit 22" and Plaintiffs now attempt to cite pertinent portions of the exhibit such as pages 73, 79 and 80 of the exhibit in response to the allegations regarding Russ and Lewis moving in together. (Mot.Recon.7). Such citations could have and should have been provided in Plaintiffs 56.1 response and the court was not obligated to scour Exhibit 22 to find out whether or not a portion created a legitimate dispute. Absent justification for Plaintiffs' delay, a motion for reconsideration is not the proper juncture to raise these points and citations. Also, Plaintiffs' citation to Exhibit 22 was merely in support of Plaintiffs conclusory 56.1 response, which as explained above was evasive and did not directly respond to statement of fact 13.

Plaintiffs also now object to statements made by Defendants in their summary judgment briefs. Plaintiffs argue that some of Defendants' statement should be stricken because Defendants failed to provide transcript testimony to Plaintiffs as is required under Federal Rule of Civil Procedure 26(a)(1). (Mot.Recon.8). However, Plaintiffs could have filed a motion to strike prior to the summary judgment ruling and have provided no justification for the delay. Again, the court rejected Plaintiffs' first set of arguments, and Plaintiffs are merely attempting to proffer new arguments to try and get the court to take a second look at the summary judgment issue.

Plaintiffs also complain that Defendants only cited selective portions of testimony, but Plaintiffs were given every opportunity in their answer briefs to Defendants' motions for summary judgment to point to the portions of the testimony that Plaintiffs thought pertinent. Plaintiffs also argue that "the court was deprived of the benefit of other *incompetent* evidence that

would have disputed the defendants' proffered 'facts" ' (Mot Recon. 9)(emphasis added). Plaintiffs argue that we should have allowed Plaintiffs to offer "inadmissible testimony" in response to Defendants' motions for summary judgments. (Mot.Recon.9). Such an argument is nonsensical. A court can only base a summary judgment ruling on evidence that would be admissible at trial. *See Smith v. Lamz*, 321 F.3d 680, 682 (7th Cir.2003)(stating that Local Rule 56.1 requires citations to admissible evidence). A party can file a motion to strike or otherwise state an evidentiary objection if evidence is raised by the opposing side in summary judgment motion briefs that would not be admissible. We considered all evidentiary objections made by Plaintiffs in their summary judgment briefs. If Plaintiffs chose not to offer other evidence because Plaintiffs thought it inadmissible, then that was their own doing, but to suggest that we should have considered what Plaintiffs admit to be "inadmissible testimony" is completely without merit. These arguments are yet another example of Plaintiffs' attempts to remedy the perceived mistakes made by them the first time around in regards to Defendants' summary judgment motions which is not the proper basis for a motion for reconsideration.

Finally, Plaintiffs argue that we erred in finding that Russ had formed a new family unit because of the holding in *Hewitt v. Hewitt*, 77 Ill.2d 49, 31 Ill.Dec. 827, 394 N.E.2d 1204 (Ill.1979). However, as indicated in our prior opinion, our ruling was based specifically on the standard elucidated in *Bell v. Wilwaukee*, 746 F.2d 1205 (7th Cir.1983). *Hewitt* was decided before *Bell* and *Hewitt* addressed the issue of property rights between co-habitants under Illinois state law, 394 N.E.2d at 52-55, while*Bell* addressed the scope of standing to bring suits under Section 1983, a federal statute, and the events in question in *Bell* occurred in Wisconsin. 746 F.2d at 1244-45. Thus, the*Hewitt* holding pertaining to co-habitation and

property rights under Illinois law is not on point and Plaintiffs have only made arguments by quoting out of context portions of *Hewitt* regarding families. Also, once again, Plaintiffs are presenting arguments that they failed to present in response to Defendants' summary judgment motions. Defendants Watts and Banaszkiewicz argued specifically in their memorandum in support of summary judgment that Russ had formed a new family unit. (W & B Mot. 9-10). However, Plaintiffs never raised the holding in *Hewitt* in their answer brief and never cited *Hewitt*. Only now are Plaintiffs seeking to remedy their perceived deficiencies in regards to Defendants' motions for summary judgment.

CONCLUSION

Based on the foregoing analysis we deny Plaintiffs' motion for reconsideration and we enter final judgment dismissing all claims brought by Russ' siblings.

NORTHERN DISTRICT OF ILLINOIS
Eastern Division

DOCKETED
Sep 10 2004

Christopher Russ

v.

Van Watts, et. al.,

JUDGMENT IN A CIVIL CASE
Case Number: 01 C 4098

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

■ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that The Court hereby enters final judgment dismissing the claims brought by the Russ' siblings.

Michael W. Dobbins, Clerk of Court

Date: 9/9/2004

s_____
Michael A. Wing, Deputy Clerk

Title 42 U.S.C.A. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

AMENDMENT XIV U.S. CONSTITUTION

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the

United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

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FILE
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OFFICE OF THE CLERK

No. 05-598

IN THE

Supreme Court of the United States

ISAAC RUSS and VERA LOVE,

Petitioners,

v.

VAN B. WATTS, PHILLIP BANAZKIEWICZ, and ROBERT HELSON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF ESTATE OF JUSTIN FIELDS, KATRINKA TORAN, AND BOBBY FIELDS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the parent-child relationship remains constitutionally protected under 42 U.S.C. § 1983 if the child is not a minor.

2. Whether a parent is prohibited from seeking recovery under 42 U.S.C. § 1983 for the death of a child if the defendant whose misconduct caused the death did not directly intend to terminate the parent-child relationship.

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INTEREST OF THE AMICI CURIAE[1]

Amici Estate of Justin Fields, Katrinka Toran, and Bobby Fields are plaintiffs in United States District Court, Eastern District of Wisconsin, Case Number 03-C-1450, a 42 U.S.C. § 1983 action against a City of Milwaukee Police Officer and the City of Milwaukee, Wisconsin. Katrinka Toran and Bobby Fields are the parents of Justin Fields, an adult African-American college student who was shot in the back and killed by Officer Craig Nawotka, a white City of Milwaukee Police Officer, on March 2, 2003. The Amici allege (and are prepared to prove) that Officer Nawotka killed Justin Fields in part due to race. The Amici are similarly situated to the Petitioners-Appellants-Plaintiffs, in that Katrinka Toran and Bobby Fields, in reliance on their constitutional rights as summarized in *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984) *overruled in part by Russ v. Watts*, 414 F.3d 783 (7th Cir. 2005), have claimed and are seeking damages for the defendants' violation of their Fourteenth Amendment substantive due process liberty interest in the companionship with their adult son, Justin Fields. This constitutional right existed under the United States Constitution as construed when the Amici commenced their action on November 18, 2003, but was subsequently eliminated by the Seventh Circuit below.

SUMMARY OF ARGUMENT

In their writ of certiorari, Petitioners have aptly demonstrated how the circuits are not merely split, but rather

1. Pursuant to Supreme Court Rule 37.6 (May 2, 2005), counsel for Amici discloses that he authored this brief in whole and no other person or entity, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of their brief and their consents are submitted herewith.

are shattered, on the issue of whether there is a constitutional liberty interest in the parent-child relationship compensable in a 42 U.S.C. § 1983 [hereafter "section 1983"] suit. Amici will not repeat what petitioners have already stated, except to note that the wholesale inability of the circuits to come to any semblance of remote agreement on the nature and extent of this liberty interest and how it is invaded begs for this Court's direction.

However, Amici will address an aspect that the Seventh Circuit below wholly ignored in scrubbing its jurisprudence clean of *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984); namely, the historical context of section 1983. That historical context reveals two critical points: (1) that the 1871 Congress was keenly sensitive to racially motivated violence; and (2) that the 1871 Congress believed that the Constitution protected the parent-child relationship and intended that trespasses of that relationship be remediable under section 1983.

Amici calls this Court's attention to these points because this Court has repeated that section 1983 must be viewed in light of its historical underpinnings. While the legislative history is not necessarily determinative of the constitutional issues pending before this Court, it does provide a framework from which the issues can take better shape. Broadly speaking, the historical context supports the Seventh Circuit's decision in *Bell v. City of Milwaukee* that there is a substantive due process liberty interest in the parent-child relationship. Narrowly speaking, however, as in the Amici's case, who allege (and are prepared to prove) that a white police officer killed their African-American son in part due to race, the historical context reminds the Court that what prompted the promises of life and liberty in the past thrives yet today: racially motivated violence.

ARGUMENT

THE UNIQUE HISTORICAL CONTEXT OF SECTION 1983 LENDS CREDENCE TO THE CONCLUSION THAT THERE IS A SUBSTANTIVE DUE PROCESS LIBERTY INTEREST IN THE PARENT-CHILD RELATIONSHIP.

Section 1983 "was intended to provide a remedy, to be broadly construed, against all forms of official violation of federally protected rights." *Monell v. New York City Dep't of Soc. Serv.*, 436 U.S. 658, 700-01 (1978); *id.* at 684 ("[T]he largest latitude consistent with the words employed is uniformly given in construing such statutes and constitutional provisions as are meant to protect and defend and give remedies for their wrongs to all the people." (quotations and citation omitted)). Section 1983's genesis was in the Reconstruction Era that followed the Civil War. *Patsy v. Bd. of Regents*, 457 U.S. 496, 503 (1982); *United States v. Price*, 383 U.S. 787, 789 (1966). The transgressions that culminated in the Civil War and its aftermath incited the adoption of the Reconstruction Amendments to the Constitution, which included the Fourteenth Amendment. *See* Martin A. Schwarz, *Section 1983 Litigation: Claims and Defenses*, § 1.03 at 1-13 (4th ed. 2003 and 2005 Supp.). This pioneering amendment marked a "vast transformation" on federalism by prohibiting the states from denying any person life, liberty, or property without due process of law and preserved the right to equal protection of the laws. U.S. Const. amend. XIV, § 1; *Mitchum v. Foster*, 407 U.S. 225, 242 (1972). Section 5 of the Fourteenth Amendment, the Enforcement Clause, specifically enabled Congress "to enforce, by appropriate legislation, the provisions of this article." *Id.*, § 5.

Tumultuous times faced a tattered country following the Civil War, and Congress was fighting hard just to preserve the Union. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 85 (1989) (Brennan, J. dissenting). Widespread civil and criminal unrest threatened to unravel much of what was fought for and won. Armed with the Enforcement Clause to the Fourteenth Amendment, Congress drafted "An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States and For other Purposes," which later became the Ku Klux Klan Act of 1871, also known as the Civil Rights Act of 1871. *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701 (1989); *Patsy*, 457 U.S. at 503; *Monell*, 468 U.S. at 665. The civil remedy for constitutional violations now found in section 1983 originated from § 1 of the Ku Klux Klan Act of 1871. *Will*, 491 U.S. at 66; *Patsy*, 457 U.S. at 503.

Given the unique historical context from which section 1983 was birthed, this Court has reminded that "[a]ny analysis of the purposes and scope of 1983 must take cognizance of the events and passions of the time at which it was enacted," *District of Columbia v. Carter*, 409 U.S. 418, 423, 425 (1973), and that "[t]he statutory descendants of § 1 of the [Ku Klux Klan Act] of 1871 must be given the meaning and sweep that their origins and their language dictate." *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 549 (1972). In other words, section 1983 must be "viewed against the events and passions of the time," *Price*, 383 U.S. at 803, and not "in a historical vacuum." *City of Newport v. Fact Concerts*, 453 U.S. 247, 258 (1981).

The Seventh Circuit below wholly ignored this Court's direction, turning not once to the "passions and events of the times" when it reached out to conclude that *Bell v. City*

of Milwaukee was wrongly decided. *See Price*, 383 U.S. at 803. The historical events and passions of the times reveal that rectifying spiraling race relations and protecting the parent-child relationship were at the forefront of Congress's agenda. Moreover, abridgment of the parent-child relationship was indeed believed by Congress to be actionable.

A. The Historical Origins of section 1983: The Impact of Race and Hate Crimes

"The specific historical catalyst for the Civil Rights Act of 1871 was the campaign of violence and deception in the South, fomented by the Ku Klux Klan, which was denying decent citizens their civil and political rights." *Wilson v. Garcia*, 471 U.S. 261, 276 (1985) (citation omitted). In the aftermath of the Civil War, "race relations in the South became increasingly turbulent." *Carter*, 409 U.S. at 425. Indeed, "[t]he [congressional] debates are replete with references to the lawless conditions existing in the South in 1871." *Ngiraingas v. Sanchez*, 495 U.S. 182, 187-88 (1990) (citation and quotations omitted). As stated by Representative Lowe during floor debate:

> While murder is stalking abroad in disguise, while whippings and lynchings and banishment have been visited upon unoffending American citizens, the local administrations have been found inadequate or unwilling to apply the proper corrective. Combinations, darker than the night that hides them, conspiracies, wicked as the worst of felons could devise, have gone unwhipped of justice.

Cong. Globe, 42d Cong., 1st Sess. 374 (1871).

Following the organization of the Ku Klux Klan by southern whites, "a wave of murders and assaults was launched against both blacks and Union sympathizers." *Carter*, 409 U.S. at 425. To "effectually secure life, liberty, and property," President Grant implored Congress to prepare legislation to combat the "condition of affairs" in some localities that rendered "life and property insecure." *Monroe v. Pape*, 365 U.S. 167, 172-73 (1961) *overruled on other grounds by Monell v. Dep't of Soc. Serv. of City of New York*, 436 U.S. 658 (1978). Congress answered President Grant's call for federal legislation "to curb this rising tide of violence." *Carter*, 409 U.S. at 425. "To the Reconstruction Congress, the need for some form of federal intervention was clear." *Id.* at 427.

The spiraling race relations had spawned the Ku Klux Klan Act of 1871. The Act began from race relations, but it did not end there.

B. The Historical Origins of section 1983: Congress's Understanding That The Constitution Protected and Intent that Section 1983 Would Remedy Invasions Of The Parent-Child Relationship.

While tumbling race relations may have provided the necessary rallying cry, the Ku Klux Klan Act of 1871 was designed for the broader unequivocal purpose of "enforc[ing] the Provisions of the Fourteenth Amendment."[2] *Carter*, 409

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2. As this Court stated in *Wilson v. Garcia*, 471 U.S. 261 (1985):

> The rights enforceable under 1983 include those guaranteed by the Federal Government in the Fourteenth Amendment: that every person within the United States is entitled to

(Cont'd)

U.S. at 423 (quotations and citations omitted); *Ngiraingas*, 495 U.S. at 187 ("Section 1983 was enacted "for the purpose of enforcing the provisions of the Fourteenth Amendment."). "By providing a remedy for the violation of constitutional rights, Congress hoped to restore peace and justice to the region through the subtle power of civil enforcement." *Wilson*, 471 U.S. at 277. Although there are "threads of many thoughts" traceable throughout the congressional debates, *Carter*, 409 U.S. at 426, the discussions surrounding the civil remedy provision, section 1 (the precursor to section 1983) "was not extended," *Will*, 491 U.S. at 68. Indeed, section 1 "was passed verbatim as introduced in both Houses of Congress." *Monell*, 436 U.S. at 665. Like all remedial legislation, key themes discussed and debated included wrongs and remedies.

As to wrongs, "[t]he atrocities that concerned Congress in 1871 plainly sounded in tort." *Wilson*, 471 U.S. at 277. "The debate on the Civil Rights Act of 1871 makes clear that its proponents were vitally concerned with the unlawful killings that characterized the reign of terror in the southern states." Steven H. Steinglass, *Wrongful Death Actions and*

(Cont'd)

> equal protection of the laws and to those fundamental principles of liberty and justice that are contained in the Bill of Rights and lie at the base of all our civil and political institutions. These guarantees of liberty are among the rights possessed by every individual in a civilized society, and not privileges extended to the people by the legislature.

Id. at 280 (quotations and citations omitted).

Section 1983, 60 Ind. L.J. 559, 648-49 (1985). Beyond that, of course, and as this Court has recognized repeatedly, the civil remedy provision secured private enforcement actions for violations of, among other things, all constitutional rights. Cong. Globe, 42d Cong., 1st Sess. app. 78 (1871) (remarks of Rep. Bingham) (Act's purpose was "the enforcement . . . of the Constitution on behalf of every citizen of the Republic . . . to the extent of the rights guaranteed to him by the Constitution.").

As to remedies, Congress gave access to the federal courts to those aggrieved. "The very purpose of 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, whether that action be executive, legislative, or judicial." *Mitchum*, 407 U.S. at 242 (citation and quotations omitted). To this end, "[t]he 1871 Congress intended § 1 to 'throw open the doors of the United States courts' to individuals who were threatened with, or who had suffered, the deprivation of constitutional rights[.]" *Patsy*, 457 U.S. at 504 (quoting Cong. Globe, 42d Cong., 1st Sess. app. 46 (1871) (remarks of Rep. Lowe)).

There was some discussion, though, regarding the claims that could be redressed in the courts. This Court has asserted that "[w]hen 1983 was enacted, it is unlikely that Congress foresaw the wide diversity of claims that the new remedy embrace." *Wilson*, 471 U.S. at 275. Indeed, floor debate regarding claims oftentimes was cast in the broadest of terms, such that the civil remedy provision was described as "'so very simply and really [a] reenact[ment] [of] the Constitution.'" *Monell*, 436 U.S. at 685 (quoting Cong. Globe, 42d Cong., 1st Sess. 586 (1871) (remarks of Rep. Edmunds)).

However, such generalizations heeded discussion of specific rights, which included dialogue about the parent-child relationship. Importantly, Representative Butler, who apparently was disappointed that the Ku Klux Klan Act did not go far enough, stated:

> This, then, is what is offered to the people of the United States as remedy for wrongs, arsons, and murders done. This is what we offer to a man whose house has been burned, as a remedy; to the woman whose husband has been murdered, as a remedy; *to the children whose father has been killed, as a remedy.*

Steinglass, 60 Ind. L.J. at 649 (quoting Cong. Gloge, 42d Cong., 1st Sess. 807 (1871)) (emphasis added).

This articulated intent is no less than astounding. Through the pages of debate, what was apparently not debatable was that invasions of the parent-child relationship was understood to be cognizable under the Constitution and intended to be remediable under section 1983. Indeed, over a century later, this constitutional understanding and congressional intent offered strong support for the Seventh Circuit's conclusion in *Bell v. City of Milwaukee*, 746 F.2d 1205, 1244 (7th Cir. 1984), that there was a constitutional liberty interest in the parent-child relationship. Regrettably, this constitutional understanding and congressional intent has been lost by the Seventh Circuit's decision below.

C. Many Courts Have Turned To The Historical Context Of Section 1983 To Support Their Conclusion That There Is A Substantive Due Process Liberty Interest In The Parent-Child Relationship.

Amici are not suggesting that the 1871 Congress's constitutional understanding that the parent-child relationship was actionable under section 1983 establishes the underlying constitutional right, only that the existence of such a right was not questioned. Amici recognize that as an initial matter, section 1983 provides only a remedy and does not itself create substantive rights. *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617-18 (1979). Further, Amici accept that drawing definitive conclusions from the legislative history of what is now section 1983 is "somewhat precarious" because the precise issue was not (and could not be) before Congress. *Patsy*, 457 U.S. at 507. But on a more fundamental level, Amici acknowledge that Congress's power under the Enforcement Clause of the Fourteenth Amendment is "corrective or preventative, not definitional." *City of Boerne v. Flores*, 521 U.S. 507, 525 (1997). Thus, while Congress can enact remedial legislation such as section 1983 to protect constitutional rights, it cannot define the precise constitutional parameters that the legislation is designed to remediate. *See id.* at 532.

However, that does not mean that the historical context is irrelevant to this Court's analysis. To the contrary, the historical context is persuasive evidence that such a right does exist. After all, remedial legislation enacted by Congress pursuant to the Enforcement Clause of the Fourteenth Amendment "'should be adapted to the mischief and wrong which the [Fourteenth] [A]mendment was intended to

provide against.'" *Id.* at 532 (quoting *Civil Rights Cases*, 109 U.S. 3, 13 (1883)). Thus, Congress's belief that the Fourteenth Amendment was intended to remedy intrusions of the parent-child relationship is reasonable, and the ease with which the precursor to section 1983 passed in Congress confirms that reasonableness. The point is that this Court can justifiably use this historical context to support its conclusion that a substantive due process liberty interest in the parent-child relationship exists.

Courts have taken this very approach. In particular, the Seventh Circuit in *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984), the case that was overturned by the Seventh Circuit below, turned to the legislative history of the Ku Klux Klan act of 1871 and embraced the above-quoted congressional intent to *support* its holding that there was a constitutional liberty interest in the parent-child relationship. After canvassing this Court's precedents that established "the primacy of the parent-child relationship," *id.* at 1243, the Seventh Circuit focused on the legislative history of the Ku Klux Klan Act of 1871, *id.* at 1244. The Seventh Circuit observed what was established above: that "the legislative history of the Ku Klux Klan Act of 1871 . . . indicates that the Act was meant to create a remedy where the parent-child relationship was interfered with by lawless, racially-motivated violence." *Id.* The court quoted approvingly Representative Butler's comments that the Ku Klux Klan Act of 1871 was given as a remedy "to the children whose father has been killed." *Id.* The court was persuaded that the "recognition of the child's rights vis-à-vis parental loss logically implies the reciprocal recognition of the parent's right vis-à-vis the loss of a child." *Id.* Thus, this history

supported its conclusion that there was a substantive due process liberty interest in the parent-child relationship.[3] *See id.*

Viewed accordingly, the congressional history and historical context of section 1983 add a rich awareness of the pervasive problems meant to be cured and the means thought best to achieve that. In other words, the historical context sheds new light on an old problem. And it is against that backdrop that the Seventh Circuit's statement below that "[a]ffording plaintiffs a constitutional due process right to recover against the state in these circumstances would create the risk of constitutionalizing all torts against individuals

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3. For other cases employing similar analyses, *see Smith v. City of Fontana*, 818 F.2d 1411, 1419 (9th Cir. 1987) (holding that there is a substantive due process liberty interest in parent-child relationship and that this conclusion "finds compelling support in the legislative history of section 1983's precursor, the Ku Klux Klan Act of 1871.") *overruled on other grounds by Hodgers-Durgin v. de la Vina*, 199 F.3d 1037 (9th Cir. 1999); *Purnell v. City of Akron*, 925 F.2d 941, 948 n.6 (6th Cir. 1991) (recognizing jurisdictions that have concluded there is parent-child liberty interest and noting that the legislative history of the Ku Klux Klan Act of 1871 supports this position); *Estate of Bailey by Oare v. County of York*, 768 F.2d 503, 509 n.7 (3d Cir.1985) (adopting general holding of *Bell v. City of Milwaukee*) *overruled on other grounds by Deshaney v. Winnegago County Dep't of Soc. Serv.*, 489 U.S. 189, 197-198 (1989); *Greene v. City of New York*, 675 F. Supp. 110, 113-15 (S.D. N.Y. 1987) (holding that there is a right to family integrity and noting legislative history of Ku Klux Klan Act of 1871 supports this position); *Sager v. City of Woodland Park*, 543 F. Supp. 282, 287, 289-90 (D. Col. 1982) (holding that parents have liberty interest and right to raise their child and recognizing that the Ku Klux Klan Act's legislative history supports the conclusion); *Irwin v. City of Hemet*, 27 Cal. Rptr. 2d 433, 439-441 (Ct. App. 1994).

who happen to have families," *Russ v. Watts*, 414 F.3d 783, 790 (7th Cir. 2005), is seen candidly for what it is: the marginalization of that for which section 1983 stands.

CONCLUSION

While Congress cannot define the constitutional rights that are actionable under section 1983, that Congress understood there to be constitutional protection as early as 1871 is persuasive evidence that such a right exists. At the very least, it merits consideration from the Supreme Court of the United States. To that end, the Amici submit this brief to aid the Court in recognizing not only the promises made to end racially motivated violence, but what has always been there: a constitutional liberty interest protecting the parent-child relationship.

For the foregoing reasons, petitioners respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted,

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